

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, and Notices
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

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This issue contains:

U.S. Customs Service

T.D. 94-81

General Notices

U.S. Court of International Trade

Slip Op. 94-155 Through 94-159

Abstracted Decisions:

Classification: C94/96 Through C94/98

Announcement of Annual Judicial Conference

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Parts 19, 112, 113, 118, 125, 146 and 178

(T.D. 94-81)

AUTHORIZATION OF BONDED CARRIERS TO TRANSPORT CARGO WITHIN PORT LIMITS WITHOUT OBTAINING CART- MAN'S LICENSE

RIN 1515-AB57

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to allow bonded carriers to transport merchandise within port limits without having to obtain a cartman's license. It also amends the regulations to allow the operators of foreign trade zones, container station and centralized examination stations and the proprietors of bonded warehouses to transport merchandise from within the district to their respective facilities. These amendments will result in savings of time and money for both the trade and Customs.

EFFECTIVE DATE: November 14, 1994.

FOR FURTHER INFORMATION CONTACT: Ernie Cunningham,
Office of Cargo Enforcement and Facilitation, Office of Inspection and
Control, at 202-927-0510.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs requires that the carriage of imported merchandise, for which duty has not yet been paid, only be accomplished by certain bonded carriers. A cartman is one who undertakes to transport goods or merchandise within the limits of a port. A lighterman is one who transports goods or merchandise on a barge, scow, or other small vessel to or from a vessel within the port or from place to place within a port. The regulations regarding cartage and lighterage of merchandise are set forth in Part 125 of the Customs Regulations (19 CFR Part 125). The

regulations regarding the bonding of carriers which receive merchandise for transportation in bond, and the licensing of cartmen and lightermen are set forth in Part 112 of the Customs Regulations (19 CFR Part 112).

Currently, pursuant to §§ 112.2(b) and 112.21, Customs Regulations, Customs requires a bond and a license to transact business as a cartman or a lighterman for the cartage or lighterage of merchandise entered for warehouse, designated for examination, taken to container stations, or taken into custody as unclaimed.

On October 29, 1992, Customs published a Notice of Proposed Rule-making (NPRM) in the Federal Register (57 FR 49049) proposing to consider within port transfers by cartmen and lightermen like other in-bond movements and to allow bonded carriers, in most instances, to carry in-bond cargo within a port without requiring them to obtain cartman or lighterman licenses.

According to the document, it was proposed that cartage and lighterage of merchandise designated for examination, taken to container stations, taken into custody as unclaimed or destined for admission to a foreign trade zone either may be done under the bond of a licensed cartman or lighterman, or if approved by the district director, under the bond of a foreign trade zone operator, container station operator, centralized examination station operator, or a bonded carrier. However, a license would still be necessary to obtain to carry in-bond merchandise within a port for the cartage of merchandise entered for warehouse; the reason for this exception was that 19 U.S.C. 1565 contained a statutory requirement that a cartman be licensed for cartage of merchandise entered for warehouse. Customs issued the proposal because it believes that the elimination of the license requirement will save Customs and the trade time and money.

STATUTORY CHANGE SINCE PROPOSAL

On December 8, 1993, the President signed the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057). Section 666 of Title VI (Customs Modernization) amended 19 U.S.C. 1565 to allow the cartage of merchandise entered for warehouse by bonded carriers as well as by licensed cartmen. Accordingly, the statement in the proposal that a license is required to transact business as a cartman and lighterman for the cartage or lighterage of merchandise entered for warehouse is no longer consistent with the statute. The statutory impediment to allowing the cartage of merchandise entered for warehouse by bonded carriers that existed at the time the proposal was published no longer exists.

ANALYSIS OF COMMENTS

A total of 19 entities responded to the proposal. Generally, each respondent supported the proposal and stated that, if adopted, the proposal would eliminate unnecessary and redundant paperwork for both Customs and the trade, would expedite the movement of cargo within

port limits, and would be a positive step in simplifying Customs procedures. Of the 19 commenters, seven fully supported the measure. The remaining commenters, although generally supportive of the purpose of the proposed amendments, suggested some changes. Some sought clarification regarding the types of cartage authorized to be performed by the operators of foreign trade zones, centralized examination stations and container stations. Specific comments requesting changes and clarifications and Customs responses are set forth below.

Comment:

Seven commenters requested that the measure be expanded to include transfers between foreign trade zones and subzones, whether within or adjacent to the same port of entry.

Response:

The regulations currently provide that cargo movements carried out outside the port limits but within the district boundaries may be accomplished by a bonded carrier. This applies to transfers between foreign trade zones and subzones. The final regulation set forth in this document provides that cargo destined for a foreign trade zone or subzone may be picked up within the district by the operator of the foreign trade zone or subzone to which it is going. This is specified by the new language for § 112.2(b).

Comment:

One commenter requested a more liberal wording of the proposed language for 19 CFR 112.2. The language for 19 CFR 112.2 reads, in part: "Cartage * * * may be done under the bond of a cartman, * * * or, if approved by the district director, a bonded carrier * * *." The commenter felt that the proposed language would still require companies with extensive route systems to submit an application of some sort in every Customs district where they anticipate performing the cartman function.

Response:

In the future, approval of the bond of a bonded carrier by the district director would indicate approval by Customs for the bonded carrier to engage in cartage. The rule would permit bonded carriers to transfer merchandise within port limits without the need for an application or a cartman or lighterman license; therefore, there is no need to further amend or adopt a more liberal wording of the proposed language in 19 CFR 112.2.

Comment:

Three commenters requested that 19 U.S.C. 1565 be amended to eliminate the requirement for cartmen licenses for cargo movements into bonded warehouses. They suggested that such an amendment could be accomplished through the Customs Modernization Act.

Response:

As noted previously in this document, § 666 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementa-

tion Act (Pub. L. 103-182) amends 19 U.S.C. 1565 to eliminate the requirement for a cartman's license for cargo movements into bonded warehouses. Any carrier designated as a carrier of bonded merchandise may cart merchandise destined for entry into a bonded warehouse. The final regulation has been amended to reflect the statutory amendment.

Comment:

One commenter suggested that Customs clarify whether a foreign trade zone operator is only entitled to engage in cartage for a foreign trade zone, a container station operator only for a container station, a centralized examination station (CES) operator only for a CES, and a bonded warehouse proprietor only for a bonded warehouse, while a licensed cartman or bonded carrier would be entitled to engage in cartage for any of those facilities, and whether district directors would be allowed some discretion in this matter.

Response:

Customs agrees that the best policy is that a foreign trade zone operator would be limited to the transportation of merchandise to his foreign trade zone, a container station operator to his container station, a CES operator to his CES, and a bonded warehouse proprietor to his bonded warehouse. A licensed cartman or a bonded carrier would be entitled to engage in transporting merchandise for any of those facilities, the cartman within the port limits and the carrier within the district boundaries. Language to this effect has been inserted in the new § 112.2(b). Once a district director has approved the respective entity's bond, that entity may engage in transporting merchandise as provided for in these regulations.

Comment:

The commenter suggests that the conditions of the custodial bond in 19 CFR 113.63 and the foreign trade zone operators bond in 19 CFR 113.73 should be revised to conform with the proposed change in 19 CFR 112.2(b).

Response:

Section 113.63, Customs Regulations, has been altered slightly to conform with the changes. Regarding the foreign trade zone operator's bond, Customs agrees that the current foreign trade zone operator's bond is inadequate to secure the operator's performance with respect to movement of goods from one zone to another. Changes have been made to 19 CFR 113.73 in the final rule.

Comment:

A commenter suggested that conforming changes referring to bonded carriers under 19 CFR 112.2(b) should be added to 19 CFR 125.11(a) and (b).

Response:

Conforming changes have been made in the final rule.

Comment:

One commenter suggested that the procedures in Part 125 seem to refer principally to cartmen, lightermen and, as proposed in the NPRM, bonded carriers. He suggests that procedures pertaining to bonded warehouse proprietors and to operators of container stations, centralized examination stations, and foreign trade zones should be made clear in the final rule.

Response:

Customs agrees that procedures pertaining to cartage and lighterage by bonded warehouse proprietors and operators of container stations, centralized examination stations and foreign trade zones should be included within Part 125. Part 125 is amended accordingly.

Comment:

One commenter observed that both bonded warehouses and foreign trade zones are facilities with specific boundaries. He suggested that Customs make clear whether receipt of merchandise by bonded warehouse proprietors for the purpose of cartage constitutes receipt into a bonded warehouse and whether receipt of merchandise by a foreign trade zone operator for the purpose of cartage constitutes receipt into an activated foreign trade zone area and the conferring of foreign trade zone status.

Response:

Receipt of merchandise for cartage purposes to a bonded warehouse by its proprietor or to a foreign trade zone by its operator constitutes receipt into the bonded warehouse or admission into the foreign trade zone. Customs approval of such transfers will continue to be accomplished through existing local procedures.

CONCLUSION

After careful consideration of the comments received and further review of the matter, it has been determined that the proposed amendments, modified as discussed above, should be adopted. The final regulation will allow the cartage and lighterage of merchandise for all purposes by bonded carriers without the necessity of obtaining a cartage license. It will also allow bonded warehouse proprietors, foreign trade zone operators, container station operators and centralized examination station operators to engage in limited cartage and lighterage under their respective bonds and to transport merchandise to their respective facilities from anywhere in the district in which their facility is located.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and based upon the information set forth above, it is certified that the regulations will not have a significant economic impact on a substantial number of small entities. The regulations eliminate duplication or otherwise unnecessary paperwork requirements and thus reduce the regulatory burden. Accordingly, the regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

PAPERWORK REDUCTION ACT

The collection of information requirements contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) under control number 1515-0193. The estimated average annual burden associated with this collection is .1666 hour per respondent and 1 hour per recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue NW, Washington, DC 20229, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 19

Customs duties and inspection, Exports, Freight, Reporting and recordkeeping requirements, Surety bonds, Warehouses, Wheat.

19 CFR Part 112

Administrative practice and procedure, Canada, Common carriers, Customs duties and inspection, Exports, Freight, Harbors, Mexico, Reporting and recordkeeping requirements, Surety bond.

19 CFR Part 113

Common carriers, Customs duties and inspection, Exports, Freight, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 118

Customs duties and inspection, Centralized examination stations, Imports.

19 CFR Part 125

Customs duties and inspection, Freight, Government contracts, Harbors, Reporting and recordkeeping requirements.

19 CFR Part 146

Administrative practice and procedure, Customs duties and inspection, Exports, Foreign trade zones, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 178

Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, parts 19, 112, 113, 118, 125, 146 and 178 of the Customs Regulations (19 CFR 19, 112, 113, 118, 125, 146 and 178) are amended as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS
AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for part 19 is revised and the specific authority citations for § 19.6 and § 19.44 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624.

* * * * *

Section 19.6 also issued under 19 U.S.C. 1555.

* * * * *

Section 19.44 also issued under 19 U.S.C. 1448.

* * * * *

2. Section 19.6(a)(1) is amended by revising the third sentence and by adding a new sentence at the end to read as follows:

§ 19.6 Deposits, withdrawals, blanket permits to withdraw and sealing requirements.

(a)(1) *Deposit in warehouse.* * * * When merchandise is deposited in a proprietor's warehouse or is accepted and receipted for by a proprietor or his agent for transport to the proprietor's warehouse, the proprietor will be responsible for the quantity and condition of merchandise reflected on entry documentation adjusted by (i) any allowance made under part 158, subparts A and B, of this chapter by the district director, and (ii) any discrepancy report made jointly on the appropriate cartage documents as set forth in § 125.31 of this chapter by the warehouse proprietor and the bonded carrier or licensed cartman or lighterman delivering the goods to the warehouse, or an independent weigher, gauger, measurer, and signed by an authorized representative of the above within 15 calendar days after deposit. * * * If the proprietor of the bonded warehouse transports the goods to the warehouse, no discrepancy report shall be necessary.

* * * * *

3. The first sentence of § 19.12(a)(1) is revised to read as follows:

§ 19.12 Warehouse recordkeeping, storage and security requirements.

(a) * * *

(1) *Record transactions.* All merchandise collected by a proprietor or his agent for transport to his warehouse shall be receipted. All such merchandise and all merchandise entered, manipulated, manufactured, smelted, refined or removed from the bonded warehouse shall be recorded in the warehouse proprietor's accounting and inventory records by bond lot number.

* * * * *

4. Section 19.44 is amended by adding a new paragraph (g) which reads as follows:

§ 19.44 Carrier responsibility.

* * * * *

(g) If a container station operator chooses to collect merchandise from within the boundaries of the district in which the container station is located and transport the merchandise to his container station, the container station operator must formally receipt for the merchandise at the time of collection, and he becomes liable under his bond for proper safe-keeping of the merchandise at that time.

* * * * *

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The general authority citation for part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. The first sentence of § 112.0 is revised to read as follows:

§ 112.0 Scope.

This part sets forth regulations providing for the bonding of carriers which will receive merchandise for transportation in bond, the licensing of cartmen and lightermen, and the procedures for applying for such bonds and licenses. * * *

3. Section 112.2(b) is revised to read as follows:

§ 112.2 Bond or license required.

* * * * *

(b) *Cartmen and lightermen.*

(1) *Necessity for bond.* A bond, as provided for in this part, is required to transact business as a cartman or lighterman. The cartage or lighterage of merchandise designated for examination, entered for warehouse, taken to container stations or centralized examination stations, taken into custody as unclaimed or destined for admission to a foreign trade zone may be done under the bond of a cartman or lighterman who is licensed pursuant to the provisions of this part or that of a bonded carrier, as provided for in paragraph (a) of this section. Foreign trade zone operators, bonded warehouse proprietors, container station operators and centralized examination station operators may engage in limited cartage or lighterage under their respective bonds. A foreign trade zone operator may engage in cartage or lighterage under his bond only for merchandise destined for his foreign trade zone and may also transport merchandise to his zone from anywhere within the district boundaries where the foreign trade zone is located. A bonded warehouse proprietor may engage in cartage or lighterage under his bond only for merchandise destined for his bonded warehouse and may also transport merchandise to his warehouse from anywhere within the district boundaries where the bonded warehouse is located. A container station operator may engage in cartage or lighterage under his bond only for

merchandise destined for his container station and may also transport merchandise to his container station from anywhere within the district boundaries where the container station is located. A centralized examination station operator may engage in cartage or lighterage under his bond only for merchandise destined for his centralized examination station and may also transport merchandise to his centralized examination station from anywhere within the district boundaries where the centralized examination station is located.

(2) *Necessity for license.* A license, as provided for in this part, is required to transact business as a cartman or lighterman for the cartage or lighterage of merchandise. Bonded carriers may engage in cartage and lighterage under their bonds without obtaining a license. Foreign trade zone operators, bonded warehouse proprietors, container station operators and centralized examination station operators may engage, under their bonds, in the limited cartage and lighterage and other transportation described in this paragraph without obtaining a license.

4. Section 112.21 is revised to read as follows:

§ 112.21 License required.

A customhouse cartage or lighterage license issued by the district director in accordance with this part or specific authorization of the Commissioner of Customs shall be required to perform Customs cartage or lighterage, except as provided in §§ 18.3 and 125.12 of this chapter or, as provided in § 112.2(b), when such merchandise is to be transported under the bond of the foreign trade zone operator, bonded warehouse proprietor, centralized examination station operator, container station operator, or a bonded carrier.

5. Section 112.25 is revised to read as follows:

§ 112.25 Bonded carriers.

A carrier or freight forwarder who has filed a bond on Customs Form 301 containing the bond conditions set forth in § 113.63 of this chapter may transport merchandise within a port for which the bond provides coverage.

PART 113—CUSTOMS BONDS

1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 113.63(a)(1) is revised to read as follows:

§ 113.63 Basic custodial bond conditions.

* * * * *

(a) *Receipt of merchandise.* The principal agrees:

(1) To operate as a custodian of any bonded merchandise received, including merchandise collected for transport to his facility, and to comply with all regulations regarding the receipt, carriage, safekeeping, and disposition of such merchandise;

* * * * *

3. Section 113.73(a)(1) is revised to read as follows:

§ 113.73 Foreign trade zone operator bond conditions.

* * * * *

(a) *Receipt, Handling, and Disposition of Merchandise.* The principal agrees to comply with:

(1) The law and Customs Regulations relating to the receipt (including merchandise received and receipted for transport to his zone), admission, status, handling, transfer, and removal of merchandise from the foreign trade zone or subzone, and

* * * * *

PART 118—CENTRALIZED EXAMINATION STATIONS

1. The general authority citation for part 118 continues to read as follows:

Authority: 19 U.S.C. 66, 1499, 1623, 1624.

2. Section 118.4 is amended by revising paragraph (g) and by adding a new paragraph (l) to read as follows:

§ 118.4 Responsibilities of a CES operator.

* * * * *

(g) Maintain a Customs custodial bond in an amount set by the district director. The bond will include liability for transporting merchandise to the CES from within the district boundaries; such liability is assumed by the CES operator when he picks up merchandise for transportation to his facility. The operator also agrees to increase the amount of the bond if deemed appropriate by the district director.

* * * * *

(l) Provide transportation for merchandise to the CES from within the district boundaries. This responsibility is optional. If the CES operator chooses to provide transportation, he shall receipt for the merchandise when he picks it up and assume liability for the merchandise at that time.

PART 125—CARTAGE AND LIGHTERAGE OF MERCHANDISE

1. The authority citation for part 125 continues to read as follows:

Authority: 19 U.S.C. 66, 1565, and 1624.

Section 125.31 also issued under 5 U.S.C. 301; 19 U.S.C. 1311, 1312, 1484, 1555, 1556, 1557, 1623, and 1646a.

Section 125.32 also issued under 5 U.S.C. 301; 19 U.S.C. 1484.

Section 125.33 also issued under 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1623, and 1646a.

Sections 125.41 and 125.42 also issued under 19 U.S.C. 1623.

2. Section 125.0 is revised to read as follows:

§ 125.0 Scope.

This part is concerned with cartage and lighterage of merchandise and the duties and liabilities of cartmen and lightermen, as well as those

parties authorized in § 112.2(b) to engage in cartage. Provisions for licensing cartmen and lightermen are in part 112 of this chapter.

3. Section 125.1 is revised to read as follows:

§ 125.1 Classes of cartage.

(a) *Government cartage.* Government cartage must be done by a licensed customhouse cartman or other bonded carrier as provided in § 112.2 of this chapter under contract or other specific authority for that purpose (except as provided for in § 125.12). All government cartage must be contracted for using the procedures specified in § 125.3.

(b) *Importers' cartage.* Importers' cartage may be done by any licensed customhouse cartman or other bonded carrier as provided in § 112.2 of this chapter.

4. Section 125.11(a) is amended by adding the words "or a bonded carrier" between the words "cartman" and "under".

5. Section 125.11(b) is amended by adding the words "or a bonded carrier" between the words "cartman" and "designated".

6. Section 125.21 is revised to read as follows:

§ 125.21 Cartage other than for examination.

Any licensed customhouse cartman, including an importer licensed to cart his own imported merchandise and a bonded carrier provided for in § 112.2 of this chapter, at the expense of the importer or other party in interest, may transfer merchandise from the importing vessel or other conveyance to a bonded warehouse, from one vessel or conveyance to another, from one bonded warehouse to another, from the public stores to a bonded warehouse, from warehouse for transportation or for exportation, and from an internal revenue warehouse for exportation under the internal revenue laws without payment of tax. Foreign trade zone operators, bonded warehouse proprietors, container station operators and centralized examination station operators may engage in limited cartage or lighterage under the conditions specified in § 112.2 of this chapter. Nothing in this section shall apply to the cartage of examination packages to the place of examination.

7. Section 125.22 is revised to read as follows:

§ 125.22 Designation of cartman or lighterman, or other bonded carrier.

Importers and exporters shall designate on the entry and permit of bonded merchandise the bonded cartman, lighterman, or other bonded carrier as provided in § 112.2 of this chapter by whom they wish their merchandise to be conveyed. An importer also may designate a foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator under the conditions specified in § 112.2 of this chapter for limited cartage; if he does so, the importer must also designate that the merchandise is bound for the facility run by the operator he designates. Approval of a designation

shall be indicated on the entry papers by the initials of the appropriate Customs officer placed in close proximity to the designation.

8. Section 125.23 is revised to read as follows:

§ 125.23 Failure to designate.

If an importer does not cart his merchandise or designate a licensed customhouse cartman, other bonded carrier, foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator, as provided for in § 112.2 of this chapter, for the purpose, it shall be carted by a bonded carrier or by a public store cartman authorized by contract or designated by the district director for that purpose. The cost of such cartage shall be paid by the importer of the merchandise before its release from Customs custody.

9. Section 125.24 is revised to read as follows:

§ 125.24 Failure of designated cartman, lighterman or other bonded carrier to appear.

The cartman, lighterman, other bonded carrier, foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator designated to convey the merchandise shall be present to take the merchandise when the Customs officer in charge is ready to send it. If the designated vehicle or lighter is not present, after waiting a reasonable time, such officer shall send the merchandise by any available licensed cartman, lighterman, or qualifying bonded carrier.

10. Section 125.32 is revised to read as follows:

§ 125.32 Merchandise delivered to a bonded store or bonded warehouse.

When merchandise is carried, carted or lightered to and received in a bonded store or bonded warehouse, the proprietor or his representative shall check the goods against the accompanying delivery ticket, Customs Form 6043, or copy of the permit, Customs Form 7501, and countersign the document acknowledging receipt of the merchandise as listed thereon. If the proprietor or his agent has been designated to carry the merchandise to his own bonded warehouse, he shall check the goods against the accompanying delivery ticket, Customs Form 6043, or copy of the permit, Customs Form 7501, at the time he picks up the cargo. Receipt of merchandise by a bonded warehouse proprietor for the purpose of transportation to his own warehouse constitutes receipt into a bonded warehouse.

11. The first sentence of § 125.33(a) is revised to read as follows:

§ 125.33 Procedure on receiving merchandise.

(a) *From public or bonded store.* A receipt shall be taken from the cartman, lighterman or bonded carrier for all goods delivered to him from public store or bonded store. * * *

* * * * *

12. Section 125.34 is amended by revising the first sentence to read as follows:

§ 125.34 Countersigning of documents and notation of bad order or discrepancy.

When a cartman, lighterman, other bonded carrier, foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator, as provided for in § 112.2, receives merchandise remaining in Customs custody, he shall countersign the appropriate document in the space provided and shall note thereon any bad order or discrepancy. * * *

13. Section 125.35 is revised to read as follows:

§ 125.35 Report of loss, detention, or accident.

Any loss or detention of bonded merchandise, or any accident happening to a vehicle or lighter while carrying bonded merchandise shall be immediately reported by the cartman, lighterman, qualified bonded carrier, foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator to the district director.

14. Section 125.36 is amended by adding the words "or bonded carrier" between the words "cartman" and "shall" in the first sentence.

15. Section 125.41 is revised to read as follows:

§ 125.41 Liability for cartage.

(a) *Liability of cartman, lighterman or bonded carrier.* The cartman, lighterman, or bonded carrier conveying the merchandise, including merchandise covered by a TIR carnet which has not been "taken on charge" (see § 114.22(c)(2) of this chapter), shall be liable under his bond for its prompt delivery in sound condition, or in no worse than the damaged condition noted on the delivery ticket, if damage is so noted.

(b) *Liability of foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator.* A foreign trade zone operator, bonded warehouse proprietor, container station operator or centralized examination station operator who picks up merchandise including merchandise covered by a TIR carnet which has not been "taken on charge", to transport the merchandise to his own facility shall be liable under his bond for the merchandise as soon as he collects the merchandise. The merchandise must be receipted as soon as it is picked up and must be delivered to either the respective foreign trade zone, bonded warehouse, container station or centralized examination station promptly after it is picked up in sound condition, or in no worse than the damaged condition noted on the delivery ticket, if damage is noted.

16. Section 125.42 is amended by revising the first sentence to read as follows:

§ 125.42 Cancellation of liability.

The district director may cancel liquidated damages not in excess of \$100,000 incurred under the bond of the foreign trade zone operator, containing the bond conditions set forth in § 113.73 of this chapter, or under the bond of the cartman, lighterman, bonded carrier, bonded warehouse proprietor, container station operator or centralized examination station operator on Customs Form 301, containing the bond conditions set forth in § 113.63 of this chapter, upon the payment of such lesser amount, or without the payment of any amount, as the district director may deem appropriate under the circumstances. * * *

PART 146—FOREIGN TRADE ZONES

1. The general authority citation for part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1623, 1624.

* * * * *

2. Section 146.4(h) is amended by adding two additional sentences, to read as follows:

§ 146.4 Operator responsibility and supervision.

* * * * *

(h) * * * If the operator elects to transfer merchandise from within the district boundaries to his zone, he shall receipt for the merchandise at the time he picks it up for transportation to his facility. He becomes liable for the merchandise at that time.

3. Section 146.40 is amended by redesignating paragraph (b) as paragraph (c) and by adding a new paragraph (b) to read as follows:

§ 146.40 Operator responsibilities for direct deliveries.

* * * * *

(b) *Transportation by operator.* If merchandise is transported to a subzone or zone site by the foreign trade zone operator from a location in the district in which the subzone or zone site is situated, the merchandise is deemed admitted at the time the foreign trade zone operator picks it up. At the time of pick-up, the operator is responsible for:

(1) Receipting for the merchandise and recording on the appropriate document any discrepancies regarding quantity, condition or the status of the seals;

(2) Transporting the merchandise to the zone or subzone; and

(3) Ensuring that the zone records reflect that the merchandise is received in the zone.

* * * * *

4. Section 146.66 (a) is amended by revising the first sentence to read as follows:

§ 146.66 Transfer of merchandise from one zone to another.

(a) *At the same port.* A transfer of merchandise to another zone with a different operator at the same port (including a consolidated port) will

be by a licensed cartman or a bonded carrier as provided for in § 112.2(b) of this chapter or by the operator of the zone for which the merchandise is destined under an entry for immediate transportation on Customs Form 7512 or other appropriate form with a Customs Form 214 filed at the destination zone. * * *

* * * * *

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority for part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding the following in the appropriate numerical sequence according to the section number under the columns indicated:

19 CFR Section	Description	OMB Control No.
* * *	* * *	*
125.22, 125.33, 125.34, 125.35	Authorization of bonded carriers to transport cargo within port limits without obtaining cartman's license.	1515-0193
* * *	* * *	*

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: October 5, 1994.

JOHN W. MANGELS,

Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 12, 1994 (59 FR 51492)]



U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 12, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF A CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A DRAWSTRING POUCH ENCLOSING A HANDHELD MIRROR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a textile drawstring pouch enclosing a handheld mirror.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after December 27, 1994.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Textile Classification Branch (202-482-7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 31, 1994, Customs published in the CUSTOMS BULLETIN, Volume 28, Number 35, a notice of a proposal to revoke District Ruling

(DD) 896053, dated April 19, 1994, that classified a drawstring pouch separately from the handheld mirror with which it was entered. The pouch was classified in subheading 4202.92. 1500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for bags similar to travel bags with an outer surface of textile materials. No comments were received in response to the notice.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), (hereinafter, section 625), this notice advises interested parties that Customs is revoking DD 896053 to reflect proper classification of the pouch with the mirror, from which this composite good takes its essential character, in subheading 7009.92. 1000, HTSUSA. A copy of Headquarters Ruling Letter (HRL) 956661 revoking DD 896053 is set forth in the attached document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(i), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 7, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 7, 1994.
CLA-2 CO:R:C:T 956661 BC
Category: Classification
Tariff No. 7009.92.1000

JOHN R. BISSELL
VENTURI, INC.
1757 Park Drive
Traverse City, MI 49684

Re: Revocation of DD 896054; classification of a textile drawstring pouch imported with a handheld mirror inside; composite good; GRI 3(b); essential character; quota; sets.

DEAR MR. BISSELL:

This responds to your letter of June 15, 1994, wherein you requested, in effect, a reconsideration of District (Director) Ruling (DD) 896054, which classified the article your company imports: a textile drawstring pouch with a handheld glass mirror inside. We have reviewed the matter and our decision follows.

Facts:

The merchandise at issue are cotton textile drawstring pouches that are imported with handheld glass mirrors inside. In DD 896054, issued on April 19, 1994, by the District Director of Customs at Ogdensburg, New York, Customs classified the pouches separately

from the mirrors in subheading 4202.92.1500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). This tariff provision imposes a quota restriction, requiring a visa for proper entry of the merchandise. You now request from Headquarters a review of that ruling. Your particular concern is the classification of the pouches.

Issue:

What is the proper classification for the subject drawstring textile pouches imported with handheld mirrors inside?

Law and Analysis:

There is no dispute as to the classification of the mirrors in subheading 7009.92.1000, HTSUSA. The question is whether the pouches should be classified separately from the mirrors.

In some circumstances, a drawstring pouch can be classified with the article it encloses. In HRL 086343, we classified a windbreaker enclosed in a drawstring pouch as a composite good on the grounds that the pouch was intended to be used as a carrying/storing case for the windbreaker. We concluded that the essential character of the composite good was imparted by the windbreaker. Thus, the carrying bag was classified with the windbreaker. In HRL 087280, we classified a poncho enclosed in a drawstring pouch as a composite good on the grounds that the pouch was intended to be used as a carrying/storing case for the poncho. We held that the essential character of the composite good was imparted by the poncho. Thus, the carrying bag was classified with the poncho. In HRL 953605, we classified plastic blocks enclosed in a textile drawstring pouch as a composite good on the grounds that the pouch was intended to provide a carrying/storing case for the blocks. The essential character of the good was imparted by the blocks. Thus, the pouch was classified with the blocks.

In each of the above cases, classification of the drawstring pouch/bag with the article it enclosed was based on General Rule of Interpretation (GRI) 3(b), which provides, in pertinent part, as follows (see HTSUSA, p. 1):

3. When, by application of rule 2(b) [pertaining to goods consisting of more than one material or substance] or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

* * * * *

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale * * * shall be classified as if they consisted of the material or component which gives them their essential character * * *.

Since, in the above cited cases, the articles enclosed in the drawstring pouches/bags imparted the essential character to the entire composite good (comprising both the pouch/bag and the article enclosed therein), both the pouch/bag and the enclosed article were classified under the tariff provision applicable to the enclosed article.

We conclude that the drawstring pouch at issue here should be classified with the mirror it encloses, since the pouch appears intended to be used as a carrying/storing container for the mirror. The mirror imparts essential character to the entire composite article. Therefore, by application of GRI 3(b), the pouch is classifiable along with the mirror in subheading 7009.92.1000, HTSUSA.

The above classification decision bears on the matter of the quota. When classifying a composite good under GRI 3(b) (as opposed to a set), the quota that applies to the component that imparts essential character is the only quota that is applied to the entire article, even if other components would be subject to quota if entered separately. (See HRL 954073, September 23, 1993, and HRL 954337, October 25, 1993.) Here, the mirror imparts essential character. Since there is no quota applicable to the mirror, there is no quota applicable to the entire article; any quota applicable to the textile pouch (if it were to be classifiable, when imported separately, under a tariff provision that imposes a quota) would not be applicable. (With a set involving textiles and/or textile products, any textile quotas applicable to any components of the set still apply, regardless of which component imparts essential character. See HRL's 085521 (June 6, 1990) and 953064 (February 25, 1993).)

You suggested in your letter that GRI 5(a) should apply to the pouch at issue. Under GRI 5(a), which provides as follows, a container enclosing an article is classified, in certain circumstances, with the article:

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character.

The pouch at issue does not fall within the ambit of GRI 5(a) because it is not specially shaped or fitted to contain a specific article. Its shape does not precisely follow the contour of the mirror; nor are there any special features which provide a special fit for the mirror. Consequently, GRI 5(a) is inapplicable.

(For your information, we have classified textile drawstring pouches of the kind at issue, when imported separately, in heading 6307, HTSUSA.)

Holding:

The subject drawstring textile pouch and handheld mirror, imported together with the mirror enclosed within the pouch, are classified in subheading 7009.92.1000, HTSUSA. This tariff provision is not subject to quota restrictions.

Accordingly, DD 896054 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF ARCHERY BOW CASES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) this notice advises interested parties that Customs is modifying two rulings pertaining to the tariff classification of molded plastic cases for carrying and storing archery bows and accessories. Notice of the proposed modification was published on August 31, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after December 27, 1994.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Textile Classification Branch (202-482-7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 31, 1994, Customs published in the CUSTOMS BULLETIN, Volume 28, Number 35, a notice of a proposal to modify Headquarters Ruling Letter (HRL) 083072, dated June 21, 1989, and New York Ruling Letter (NYRL) 826246, dated December 18, 1987, each concerning the tariff classification of a molded plastic case for carrying and storing archery bows and accessories. No comments were received in response to the notice.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is modifying HRL 083072 and NYRL 826246. A copy of HRL 956141 that modifies these rulings and holds that the molded plastic archery bow case at issue is classifiable in subheading 4202.99.9000, HTSUSA, is set forth in the attached document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 7, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 7, 1994.

CLA-2 CO:R:C:T 956141 BC
Category: Classification
Tariff No. 4202.99.9000

WILLIAM J. LECLAIR
TRANS-BORDER CUSTOMS SERVICE
One Trans-Border Drive
P.O. Box 800
Champlain, NY 12919

Re: Modification of HRL 083072 and NYRL 826246; classification of a molded plastic case for carrying and storing an archery bow with accessories.

DEAR MR. LECLAIR:

It has come to our attention that Headquarters Ruling Letter (HRL) 083072, dated June 21, 1989, should be modified. It classified a molded plastic case for carrying an archery bow and accessories under subheading 4202.12.2090, Harmonized Tariff Sched-

ule of the United States Annotated (HTSUSA). As set forth below, the proper classification for this article is subheading 4202.99.9000, HTSUSA. In view of the fact that HRL 083072 modified an earlier Customs ruling, New York Ruling Letter (NYRL) 826246, dated December 18, 1987, that ruling also should be modified.

Facts:

The merchandise at issue was described in HRL 083072 as "a plastic case manufactured to house a bow and related equipment * * * made of high impact resistant ABS plastics." We understand the articles housed in the case to be an archery bow with accessories. We further understand the case to be specially shaped or fitted to house the bow and accessories. The ruling stated the following: "We have determined that the correct classification of this merchandise is under subheading 4202.12.2090 as a container similar to gun cases and musical instrument cases with an outer surface of plastics."

In NYRL 826246, the archery bow case was classified in subheading 4202.92.4500, HTSUSA.

Issue:

What is the proper classification for the subject molded plastic archery bow case?

Law and Analysis:

Subheading 4202.12.20, HTSUSA, provides for trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers: with outer surface of plastics or of textile materials: with outer surface of plastics * * *." Any article classified under subheading 4202.12.20, HTSUSA, must be one of the named articles or a similar article. The archery bow case at issue is not similar to these named articles. Consequently, it cannot be classified in subheading 4202.12.2090, HTSUSA (4202.12.2085 in the current tariff), as it was in HRL 083072.

In HRL 083072, as quoted above, we found that the archery bow case is similar to gun cases and musical instrument cases. We agree with this finding. However, such cases are classifiable under subheading 4202.99.9000, HTSUSA, which, as an "other" provision, covers cases named in the first part of the heading (prior to the semicolon) that are not specifically provided for elsewhere under the heading, and similar cases, that are made of molded plastic.

Holding:

The molded plastic archery bow case at issue is classifiable in subheading 4202.99.9000, HTSUSA, as a molded plastic carrying and storage case that is similar to a gun case or musical instrument case. The applicable duty rate is 20% *ad valorem*.

Accordingly, HRL 083072 and NYRL 826246 are hereby modified to reflect the above classification.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

**MODIFICATION OF CUSTOMS RULING LETTER RELATING TO
VALUE OF FOREIGN PROCESSING UNDER SUBHEADING
9802.00.60**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter, concerning the value of foreign processing of aluminum ingots for purposes of the partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS).

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1025(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a past ruling pertaining to the value of foreign processing of aluminum ingots for purposes of the partial duty exemption under subheading 9802.00.60, HTSUS. Notice of the proposed modification was published August 17, 1994, in the *CUSTOMS BULLETIN*, Volume 28, Number 33.

EFFECTIVE DATE: Merchandise entered, or withdrawn from warehouse, for consumption on or after December 27, 1994.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Office of Regulations and Rulings, Special Classification & Marking Branch (202-482-6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 18, 1994, Customs published a notice in the *CUSTOMS BULLETIN*, Volume 28, Number 33, proposing to revoke Headquarters Ruling Letter (HRL) 557574, issued February 15, 1994, by the Director, Commercial Rulings Branch, U.S. Customs Service Headquarters. The ruling concerned the value of foreign processing of aluminum ingots, for purposes of the partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103-82, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying HRL 557574 to reflect that for purposes of the partial duty exemption under subheading 9802.00.60, HTSUS, the value of foreign processing to be included in the amount subject to duty shall not include the general expenses and profit of the seller, who is not the foreign processor, and does not perform the processing. Customs does not intend to change its position as it applies to the general expenses and profit of the actual processor of the merchandise, which

are attributable to the foreign processing and includible as part of the value subject to duty under subheading 9802.00.60, HTSUS. Copies of HRL 557574 and the ruling letter modifying HRL 557574 are set forth as Attachments A and B, respectively, to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 7, 1994.

CRAIG WALKER,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 15, 1994.
CLA-2 CO:R:C:S 557574 BLS
Category: Classification
Tariff No. 9802.00.60 and 7606.12.3055

MR. MATTHEW CHANG
ITOCHU INTERNATIONAL INC.
335 Madison Avenue
New York, NY 10017

Re: Value of foreign processing of aluminum ingots for purposes of determining partial duty exemption under subheading 9802.00.60, HTSUS.

DEAR MR. CHANG:

This is in reference to your letter dated September 10, 1993, requesting a ruling regarding the proper value of foreign processing to be used for purposes of determining the partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

ITOCHU International Inc. ("International") will purchase aluminum ingots of U.S.-origin. These ingots will then be sold to ITOCHU Corporation ("ITOCHU"), parent of International, which will then export them to Japan. The ingots will be processed in Japan by a third party, Furukawa Electric Co., Ltd., by melting and then rolling the molten aluminum to form sheet in cords. ITOCHU will retain title to the product during the processing. The resultant material will then be packaged for export and sold to International, which will act as importer of record.

The material will be further processed in the U.S. by American National Can Corporation ("ANC"). ANC coats the sheet aluminum with a chemical process, then presses this "lidstock" into aluminum can lids. The pressing operation simultaneously cuts the material to the proper size, makes the indentation where the can opening will be, and attaches the "flip-top" ring, or opener. The lids are then combined with can body stock in a separate operation, producing completed aluminum beverage cans. ANC's main customer is Anheuser-Busch.

ITOCHU will present International with an invoice for entry purposes which will separately state the following amounts;

- (A) Direct processing charges
- (B) Inland transportation of ingots in Japan
- (C) Ocean freight of aluminum sheet exported to U.S.

- (D) Aluminum ingot cost
- (E) Marine insurance for aluminum sheet
- (F) ITOCHU Corp. commission

Item (D) will be the same amount as that charged by International when the ingots were sold for export from the U.S. Item (D) will also include the ocean freight and insurance for the ingots sold to Japan (sales price is CIF, Yokohoma).

You state that Item (F), while listed as a "commission", is in actuality ITOCHU's profit and overhead, its mark-up for taking title and risk, and for overseeing processing in Japan.

It is your opinion that Items (B), (C), (D), (E) and (F) above, are non-dutiable charges, and that only the direct processing cost, Item (A), is a dutiable charge. However, you state that you were advised by Customs personnel at one port that Item (F) should also be included as part of dutiable value. In a telephonic communication with your office, we were advised that you believe the returned product qualifies for the partial duty exemption under subheading 9802.00.60, HTSUS, and the only issue which you ask us to address is the value of the foreign processing, for purposes of determining the extent of the exemption.

Issue:

Whether the value of the processing performed abroad, in addition to the direct costs of processing, includes Items (B) through (F), above, for purposes of determining the partial duty exemption under subheading 9802.00.60, HTSUS.

Law and Analysis:

Subheading 9802.00.60, HTSUS, provides a partial duty exemption for:

[any article of metal (as defined in U.S. note 3(d) of this subchapter) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

This tariff provision imposes a dual "further processing requirement on eligible articles of metal—one foreign, and when returned, one domestic. Metal articles satisfying these statutory requirements may be classified under subheading 9802.00.60, HTSUS, with duty payable only on the value of such processing performed outside the U.S., provided there is compliance with the documentary requirements of section 10.9, Customs regulations (19 CFR 10.9).

U.S. Note 3(a) to Subchapter II, Chapter 98, HTSUS ("Note 3(a)"), applicable to subheadings 9802.00.40 through 9802.00.60, HTSUS, provides in pertinent part that—

(a) The value of repairs, alterations, processing or other change in condition outside the United States shall be:

(i) The cost to the importer of such change; or

(ii) If no charge is made, the value of such change,

as set out in the invoice and entry papers; except that, if the appraiser concludes that the amount so set out does not represent a reasonable cost or value, then the value of the change shall be determined in accordance with section 402 of the Tariff Act of 1930, as amended.

Section 10.9(j), Customs Regulations (19 CFR 10.9(j)), provides in part, that in connection with the basis for assessment of duty under subheading 9802.00.60, HTSUS, the cost or fair market value of the foreign processing shall be limited to the cost or value of the processing actually performed abroad (including all domestic and foreign articles used in the processing, but does not include the exported U.S. metal article) and shall not include any of the expenses incurred in the U.S., whether by way of engineering costs, preparation of plans or specifications, and the furnishing of tools or equipment for doing the processing abroad, or otherwise.

In C.S.D. 82-150 (Headquarters Ruling Letter (HRL) 542866) dated July 30, 1982, we held that in connection with articles sent abroad for repairs or alterations, costs incurred to transport the articles from the U.S. to a foreign facility were not dutiable under TSUS Item 806.20 (predecessor to subheading 9802.00.50, HTSUS) because the expenses were incurred in the U.S. Further, in HRL 544015, dated March 20, 1989, we found that charges incurred in connection with the transportation of the article from the foreign facility to the U.S. (packing, loading, insurance and express carriage), were also not includible under

TSUS item 806.20, since they were incurred after the foreign repair or Processing operation. We pointed out that the value of the repair or alteration was limited to the "cost or value of the repairs or alterations actually performed abroad." (See 19 CFR 10.8(1).) In this regard, we note that the analysis set forth in these rulings is equally applicable "to the cost or value of the processing actually performed abroad" for purposes of subheading 9802.00.60, HTSUS. See 19 CFR 10.9(j), *supra*.

Accordingly, we find that the costs incurred to transport the ingots to be processed to the foreign facility, which includes inland transportation in Japan (Item (B)), are not considered part of the cost or value of the processing actually performed abroad, and are not part of dutiable value. The costs for ocean freight of the aluminum sheet (Item (C)), and marine insurance for such transport (Item (E)), are costs incurred following the foreign processing in connection with the transportation of the article from the foreign facility to the U.S. Therefore, these charges as well are not considered to be part of the cost or value of the processing for purposes of Note 3(a). Furthermore, the cost (or value) of the U.S.-origin aluminum ingots is not part of the cost or value of the processing actually performed abroad, and, therefore, is also not includible as part of dutiable value.

The next issue which we must address is the dutiability of Item (F), the so-called ITOCHU "Commission", which you advise is actually ITOCHU's general expenses and profit. In *United States v. Douglas Aircraft Co.*, 510 F.2d 1387 (1974), 62 CCPA 53, the appellate court overturned the Customs Court and held that the cost of certain Canadian tooling was properly includible in the value of foreign processing for purposes of TSUS item 806.30 (predecessor to subheading 9802.00.60, HTSUS), although such value was not included in the price charged by the foreign processor. In the course of its opinion, the court pointed out that the term "cost" or "reasonable cost" as set forth in the statute should be interpreted according to sound business accounting practice. Thus, the court said that the cost of processing would include both direct and indirect costs, which includes factory overhead.

In addition, the court noted that in accordance with the exception provided under Headnote 2, Subpart B, Part 1, Schedule 8, (predecessor to "Note 3(a)11), the appraising officer had the discretion (to be exercised in a reasonable manner) to disregard the amount set out in the invoice and entry papers if it did not represent a reasonable cost or value, and determine the value of the processing under the appraisement statute.

Accordingly, under the authority of *Douglas*, factory overhead is clearly includible as part of the cost of processing. We also find that under the *Douglas* rationale, Profit would be considered a cost of processing, as a normal mark-up is in accordance with "sound business Practice". As the court pointed out with regard to tooling, the appraising officer could reasonably conclude that without this element of value, the amount set out in the invoice and entry papers would not represent a reasonable cost or value. Similarly, based on the court's reasoning, we find that the amount set out in the invoice and entry papers must include a normal markup in order to be considered a reasonable cost or value for purposes of Note 3(a). Therefore, Item (F) (general expenses and profit) is includible as part of the cost of processing.

Holding:

For purposes of determining the amount of the partial duty exemption under subheading 9802.00.60, HTSUS, the value of foreign processing subject to duty shall include direct processing charges (Item (A)), and general expenses and profit attributable to the foreign processing (Item (F)). However, the value of the foreign processing shall not include the cost of the U.S.-origin aluminum ingots exported to Japan (Item (D)), costs relating to inland transportation of the ingots in Japan (Item (B)), and charges in connection with the ocean freight and marine insurance for the processed article shipped to the U.S. (Items (C) and (E)).

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 7, 1994.

CLA-2: CO:R:C:S BLS
Category: Classification
Tariff No. 9802.00.60

MR. MATTHEW CHANG
ITOCHU INTERNATIONAL INC.
335 Madison Avenue
New York, NY 10017

Re: Reconsideration and modification of HRL 557574 concerning the value of foreign processing under subheading 9802.00.60, HTSUS.

DEAR SIR:

This is in reference to your letter dated March 29, 1994, requesting reconsideration of Headquarters Ruling Letter (HRL) 557574 dated February 15, 1994, concerning the value of foreign processing of aluminum ingots, for purposes of the partial duty exemption under subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

ITOCHU International Inc. ("international") will purchase aluminum ingots of U.S. origin. These ingots will then be sold to ITOCHU Corporation ("ITOCHU"), parent of International, which will take title and risk of the ingots on a C.I.F. (Nagoya, Japan) basis. ITOCHU will then arrange for inland transportation of the ingots to the plant of the actual processor, Furukawa Electric Co., Ltd. ("Furukawa"), an unrelated company. The ingots will be processed by melting and then rolling the molten aluminum to form sheet in cords. Upon completion of the processing, ITOCHU will take possession of the sheets, issue the appropriate documentation (invoice, bill of lading, and insurance policy) and will be responsible for transportation to the U.S. (re-sale to international is on a CIF, U.S. port basis). Once documentation is prepared (including the Declaration of the Foreign Processor, which is prepared by Furukawa), the goods are loaded aboard a vessel for export to the U.S.

In HRL 557574, we held that for purposes of determining the partial duty exemption under subheading 9802.00.60, HTSUS, the value of foreign processing shall include, in addition to the direct processing charges, the general expenses and profit attributable to such processing. We found that "Item F", the "ITOCHU Corp. commission", as described on the original submission, which you state to be ITOCHU's general expenses and profit, was includible as part of the value of the foreign processing. We also held that the cost of the U.S.-origin aluminum ingots exported to Japan, the costs relating to inland transportation of the ingots in Japan, and charges in connection with the ocean freight and marine insurance for the processed article shipped to the U.S., were not includible as part of the value of the foreign processing. However, you believe we erred in including ITOCHU's general expenses and profit as part of the value of the foreign processing since ITOCHU is not the foreign processor, and that the ruling should be modified accordingly. In this regard, you state that as the processor of the exported ingots, Furukawa included overhead and profit in its price invoiced to ITOCHU.

Issue:

Whether the value of processing performed abroad shall include ITOCHU's overhead and profit, for purposes of the partial duty exemption under subheading 9802.00.60, HTSUS.

Law and Analysis:

Subheading 9802.00.60, HTSUS, provides a partial duty exemption for:

[a]ny article of metal (as defined in U.S. note 3(d) of this subchapter) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the

United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

This tariff provision imposes a dual "further processing" requirement on eligible articles of metal—one foreign, and when returned, one domestic. Metal articles satisfying these statutory requirements may be classified under subheading 9802.00.60, HTSUS, with duty payable only on the value of such processing performed outside the U.S., provided there is compliance with the documentary requirements of section 10.9, Customs Regulations (19 CFR 10.9).

U.S. Note 3(a) to Subchapter II, Chapter 98, HTSUS ("Note 3(a)"), applicable to subheadings 9802.00.40 through 9802.00.60, HTSUS, provides in pertinent part that—

(a) The value of repairs, alterations, processing or other change in condition outside the United States shall be:

- (i) The cost to the importer of such change; or
- (ii) If no charge is made, the value of such change,

as set out in the invoice and entry papers; except that, if the appraiser concludes that the amount so set out does not represent a reasonable cost or value, then the value of the change shall be determined in accordance with section 402 of the Tariff Act of 1930, as amended.

Section 10.9(j), Customs Regulations (19 CFR 10.9(j)), provides in part that in connection with the basis for assessment of duty under subheading 9802.00.60, HTSUS, the cost or fair market value of the foreign processing "shall be limited to the cost or value of the processing actually performed abroad (including all domestic and foreign articles used in the processing, but does not include the exported metal article) and shall not include any of the expenses incurred in the U.S., whether by way of engineering costs, preparation of plans or specifications, and the furnishing of tools or equipment for doing the processing abroad, or otherwise".

In *United States v. Douglas Aircraft Co.*, 510 F.2d 1387 (1974), 62 CCPA 53, the appellate court overturned the Customs Court and held that the cost of Canadian tooling was properly includible in the value of foreign processing for purposes of TSUS item 806.30 (predecessor to subheading 9802.00.60, HTSUS), although such value was not included in the price charged by the foreign processor. In the course of its opinion, the court pointed out that the term "cost" or "reasonable cost" as set forth in the statute should be interpreted according to sound business practice. Thus, the court stated that the cost of processing would include both direct and indirect costs, which include factory overhead.

In addition, the court noted that in accordance with the exception provided under Headnote 2, Subpart 1, Schedule 8, (predecessor to "Note 3(a)"), the appraising officer had the discretion (to be exercised in a reasonable manner) to disregard the amount set out on the invoice and entry papers if it did not represent a reasonable cost or value, and determine the value of the processing under the appraisement statute.

Accordingly, under the authority of *Douglas*, we held, in HRL 557574, that factory overhead (general expenses) is includible as part of the cost of processing. We also found, under the *Douglas* rationale, that profit would be considered a cost of processing, as a normal mark-up is in accordance with "sound business practice", and that the appraising officer could reasonably conclude that without this element of value, the amount set out in the invoice and entry papers would not represent a reasonable cost or value. As a result of our determination with regard to the value of foreign processing, we held that the ITOCHU "commission", representing ITOCHU's overhead and profit, must be included in the value of the foreign processing for purposes of determining the amount subject to duty under subheading 9802.00.60, HTSUS.

Since ITOCHU is not the actual processor of the aluminum ingots, and its overhead and profit are not attributable to the processing performed abroad, these costs are not includible as part of the value of the foreign processing for purposes of the partial duty exemption under subheading 9802.00.60, HTSUS. However, the value of the foreign processing subject to duty shall include the general expenses and profit attributable to such processing, incurred by Furukawa, the actual processor of the ingots.

Holding:

For purposes of the partial duty exemption under subheading 9802.00.60, HTSUS, the value of foreign processing subject to duty shall include the general expenses and profit attributable to the foreign processing. Since ITOCHU's general expenses and profit are

not related to the foreign processing, these costs are not includible as part of the value of the foreign processing. HRL 557574 is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WALKIE-TALKIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of walkie-talkies. Notice of the proposed modification was published August 31, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 35.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after December 27, 1994.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482-7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 31, 1994, customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 35, proposing to modify Cleveland District Ruling Letter (DD) 885222, issued May 12, 1993, by the District Director of Customs, Cleveland, Ohio, wherein five separate articles were classified. One of the products, identified as a toy walkie-talkie, was classified in subheading 8525.20.20, Harmonized Tariff Schedule of the United States (HTSUS).

One comment was received in response to the notice. The commenter expressed opposition to the proposed modification, essentially contending that the walkie-talkie's principal use is to transmit and receive signals, not to amuse. The commenter asserted that heading 8525 provides for low-powered transceivers and that, as such, these items are not of limited use, but are indistinguishable from "real" walkie-talkies. The commenter cited Customs rulings in which cheaply constructed, color-

fully designed clock radios, stereos, and cassette players for children were classified in accordance with their utilitarian purposes, not as toys. The commenter also noted that low-powered baby monitors meet the terms of heading 8525, despite their limited range and low cost.

Although the toy walkie-talkie is described in heading 8525, it is also classifiable in Chapter 95. The article is thus excluded from classification in heading 8525 by Note 1(p) to Section XVI. The fully functional articles cited by the commenter receive or produce sound one way only. Their uses are not (or, are not as) limited by a lack of range capacity as are items designed for two-way communications. The toy walkie-talkies are designed to provide amusement through two-way communication other than face to face, but only at a short distance that is relatively free of obstacles. While children's clock radios, stereos, and cassette players are designed to keep time, receive broadcasts, and/or play recordings in much the same manner as their more expensive and durable counterparts, walkie-talkies primarily designed for purposes other than amusement require the range, power, and durability to support reliable two-way communications on which human life and safety might depend (e.g., in police, fire, rescue, and construction work).

For these reasons, we find that the toy walkie-talkies are capable of a limited use, but are distinguishable by their limited capacity from real walkie-talkies classifiable in heading 8525.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying DD 885222. Accordingly, Customs is issuing a ruling letter to reflect proper classification of the merchandise in subheading 9503.70.80, HTSUS, which provides for "Other toys * * * and accessories thereof: Other toys, put up in sets or outfits, and parts and accessories thereof: Other: Other." The ruling modifying DD 885222 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 6, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, October 6, 1994.

CLA-2 CO:R:C:F 956534 GGD

Category: Classification

Tariff No. 9503.70.80

MR. WARREN E. COE
AMWAY CORPORATION
7575 Fulton Street, East
Ada, MI 49355-0001

Re: Modification of Cleveland district ruling letter (DD) 885222; toy walkie-talkies; not transmission apparatus incorporating reception apparatus.

DEAR MR. COE:

In DD 885222, issued May 12, 1993, five separate articles were classified. One of the products, identified as a toy walkie-talkie (but which was actually a pair), was classified in subheading 8525.20.20, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Transmission apparatus for radiotelephony ***: Transmission apparatus incorporating reception apparatus: Transceivers: Low-power radiotelephonic transceivers operating on frequencies from 49.82 to 49.90 MHz." We have reviewed that ruling and, with respect to the toy walkie-talkies, have found it to be partially in error. The correct classification is as follows.

Facts:

The article at issue, identified by SKU No. Z9581, and by Vendor No. SOUNDESIGN PS-180, consists of a pair of 49.86 MHz, battery-powered walkie-talkies that allow children to talk to each other while they play. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 885222 was published on August 31, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 35.

Issue:

Whether the article is properly classified as a transmission/reception apparatus in subheading 8525.20.20, HTSUS, or as other toys put up in sets in subheading 9503.70.80, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 8525, HTSUS, Provides for, among other items, transmission apparatus for radiotelephony, whether or not incorporating reception apparatus. Heading 8525 falls within Section XVI, HTSUS. Note 1(p) to Section XVI, states that the section does not cover articles of chapter 95. Thus, if the walkie-talkie set is described in both Section XVI and Chapter 95, it is classified in Chapter 95.

Heading 9503, HTSUS, applies to "other toys," i.e., all toys not specifically provided for in the other headings of chapter 95. Although the term "toy" is not defined in the tariff, the EN to chapter 95 indicates that a toy is an article designed for the amusement of children or adults. The ENs to heading 9503 indicate that certain toys, including toy arms, tools, gardening sets, tin soldiers, etc., are often put up in sets. The ENs also state that certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of a limited "use," but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.

Mindful of the toy walkie-talkies' low value, limited range, and durability relative to real walkie-talkies, we find that the article is designed principally for amusement, and is properly classified in subheading 9503.70.80, HTSUS, the provision for other toys put up in sets.

Holding:

The toy walkie-talkie set, identified by SKU No. Z9581, and by Vendor No. SOUNDESIGN PS-180, is classified in subheading 9503.70.80, HTSUS, the provision for "Other toys * * * and accessories thereof: Other toys, put up in sets or outfits, and parts and accessories thereof: Other: Other." The applicable duty rate is 6.8 percent *ad valorem*.

DD 885222, dated May 12, 1993, is hereby modified.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE NAFTA ELIGIBILITY OF SOLUTION ADMINISTRATION SETS

ACTION: Notice of proposed modification of a North American Free Trade Agreement (NAFTA) eligibility ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the NAFTA Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the NAFTA eligibility of solution administration sets. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 25, 1994.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC, 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482-7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the

NAFTA Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the NAFTA eligibility of solution administration sets.

New York (NY) 895684 dated April 15, 1994, held that the "Accuset", and "Gemini" solution administration sets were not eligible for preferential tariff treatment under the NAFTA pursuant to General Note 12(b)(iv)(B), HTSUS. In essence, NY 895684 stated that the foreign components (non-originating NAFTA components), other than the cassette, were classified as parts under subheading 9018.90.80, HTSUS. Therefore, the non-originating components, other than the cassette, did not undergo the change in tariff classification required by General Note 12(t)/90.46, HTSUS. Based on the above classification, NY 895684 stated that the "Accuset" and "Gemini" solution administration sets did not meet the "originating good" rules of origin requirement in General Note 12(b)(iv)(B), HTSUS, because "[t]he Gemini set and the parts are provided for in a basket provision that does not specifically describe the goods themselves and the parts", and the "Accuset" " * * * and some of the non-originating materials are classified in two different subheadings of the same heading." This ruling letter is set forth in Attachment A to this document.

In disqualifying the "Accuset" and "Gemini" solution administration sets from NAFTA preferential tariff treatment, NY 895684 held, in essence, that General Note 12(b)(iv)(B), HTSUS, is applied at the 10 digit level. Customs Headquarters is of the opinion that this determination is incorrect. General Note 12(b)(iv)(B), HTSUS, concerning "parts", is applied at the six-digit level pursuant to Section 2(3)(c) of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 CFR Appendix to Part 181).

Customs intends to modify NY 895684 to reflect this interpretation. Proposed HRL 956751 modifying NY 895684 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October, 6, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 15, 1994.
CLA-2-90:S:N:N3:119 895684
Category: Classification
Tariff No. 9018.90.8000 and 9018.90.7560

MR. KENT PAULSEN
CAL PACIFICO OF CALIFORNIA
1300 Quail Street, Suite 208
Newport Beach, CA 92660-2777

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of Solution Administration Sets from Mexico.

DEAR MR. PAULSEN:

In your letter dated February 28, 1994, received March 16, 1994 by this office, you requested a ruling on the status of two solution administration sets from Mexico under the NAFTA. The request is being made on behalf of Imed Corporation, San Diego, CA.

The two sets are assembled in Mexico from components made in the United States, Ireland, Italy or other foreign countries and are marketed under the same names Gemini and Accuset.

The various components used in the two sets include drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap. The Accuset has a cassette attached which fits into an electronic infusion pump. It is apparent from the drawing furnished that the Accuset is dedicated for use with the pump and would not be used otherwise.

A section of the tubing of the Gemini set is made of silicon rubber which is more resilient than plastic and is suitable to be used with the type of pump which regulates the flow of liquid by compressing and releasing that part of the tubing. The Gemini set can operate by gravity just as any other standard solution administration set and will be classified accordingly.

With the exception of the cassette all the foreign components used in the two sets are classifiable in 9018.90.80000 since they are used principally in standard solution administration sets or in some cases in such sets as well as in articles of 9018.39.0000.

The applicable tariff provision for the Gemini solution administration set will be 9018.90.8000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for instruments and appliances used in medical, surgical, dental or veterinary sciences * * * parts and accessories thereof * * * other. The general rate of duty will be 7.9 percent.

The applicable tariff provision for the Accuset solution administration set will be 9018.90.7560, HTSUSA, which provides for electro-medical instruments and appliances and parts and accessories thereof * * * other. The general rate of duty will be 4.2 percent.

The two solution administration sets do not qualify for preferential treatment under the NAFTA for the following reasons:

The Gemini and Accuset solution administration sets will not be made exclusively from originating materials.

The non-originating materials (other than the cassette) used in the production of the Gemini and Accuset administration sets will not undergo the change in tariff classification required by General Note 12(t)/90 HTSUSA, line 46: A change to subheading 9018.90 from any other heading.

The Gemini solution administration set will not meet the exception to the above tariff classification change rules regarding goods and parts thereof classifiable in the same heading or subheading as stated in General Note 12(b)(iv)(B): "the tariff headings for such goods provide for and specifically describe both the goods themselves and their parts and is not further divided into subheadings, or the subheadings for such goods provide for and specifically describe both the goods themselves and their parts". The Gemini set and the parts are provided for in a basket provision that does not specifically describe the goods themselves and the parts.

The Accuset solution administration set will not meet the exception to the above tariff classification change rules regarding goods and parts thereof classifiable in the same heading or subheading as stated in General Note 12(b)(iv)(B)—cited above—because the

set and some of the non-originating materials are classified in two different subheadings of the same heading.

This ruling is being issued under the provision of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter should be attached to the entry document filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Should you wish to request an administrative review of this ruling, submit a copy of this ruling and all relevant facts and arguments within 30 days of the date of this letter, to the Director, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Ave. N.W., Franklin Court, Washington, DC 20229.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC
CLA-2 CO:R:C:M 956751 KCC
Category: Classification
Tariff No. 9018.90.75 and 9018.90.80

SCOTT E. ROSENOW, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Suite 807
Washington, DC 20036-5605

Re: NY 895684 modified; Solution Administration Sets; "Accuset"; "Gemini"; NAFTA; Article 509; originating good; General Note 12(b)(ii), 12(b)(iv)(B) and 12(p); change in tariff classification; non-originating materials; General Note 12(t)/90.46; Section 2(1), 2(3)(c), and 4(4)(b), NAFTA Rules of Origin Regulations; parts; subheading; production.

DEAR MR. ROSENOW:

This is in regards to your letter dated July 19, 1994, on behalf of Cal Pacifico and Imed Corporation, requesting reconsideration of New York (NY) 895684 dated April 15, 1994, which held that the solution administration sets were not eligible for preferential tariff treatment under the North American Free Trade Agreement (NAFTA).

Facts:

The articles under consideration in NY 895684 are the "Accuset" and "Gemini" solution administration sets which are used in the medical industry for infusions. Both solution administration sets are composed of a drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap. The "Accuset" has an additional component, a cassette which will fit into an electronic infusion pump. The solution administration sets are assembled in Mexico from the above components which are made in the U.S. and other foreign countries.

In NY 895684 the Area Director of Customs, New York Seaport, classified the "Accuset" solution administration set as other electro-medical instruments and appliances and parts and accessories, used in medical, surgical, dental or veterinary sciences under subheading 9018.90.75, Harmonized Tariff Schedule of the United States (HTSUS), and the "Gemini" solution administration set as other instruments and appliances and parts and accessories thereof, used in medical, surgical, dental or veterinary sciences under subheading 9018.90.80, HTSUS.

The subheadings at issue are:

9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof * * *

9018.90	Other instruments and appliances and parts and accessories thereof * * *
9018.90.75	Other * * * Electro-medical instruments and appliances and parts and accessories thereof * * * Other * * * Other * * *
9018.90.80	Other * * * Other.

Additionally, in NY 895684 the solution administration sets were held not to be eligible for preferential tariff treatment under the NAFTA pursuant to General Note 12(b)(iv)(B), HTSUS. In essence, NY 895684 stated that the foreign components (non-originating NAFTA components), other than the cassette, were classified as parts under subheading 9018.90.80, HTSUS. Therefore, the non-originating components, other than the cassette, did not undergo the change in tariff classification required by General Note 12(t)/90.46, HTSUS. NY 895684 stated that the "Gemini" solution administration set did not meet the "originating good" rules of origin requirement in General Note 12(b)(iv)(B), HTSUS, because "[t]he Gemini set and the parts are provided for in a basket provision that does not specifically describe the goods themselves and the parts." NY 895684 stated that the "Accuset" solution administration set did not meet the "originating good" rules of origin requirement in General Note 12(b)(iv)(B), HTSUS, because " * * * the set and some of the non-originating materials are classified in two different subheadings of the same heading."

Issue:

Are the "Accuset" and "Gemini" solution administration sets eligible for preferential tariff treatment under the NAFTA pursuant to General Note 12(b)(iv)(B), HTSUS?

Law and Analysis:

To be eligible for tariff preferences under the NAFTA, goods must be "originating goods" within the rules of origin in General Note 12(b), HTSUS. In this case, there are two methods by which goods imported into the United States may be "goods originating in the territory of a NAFTA party." General Note 12(b), HTSUS, sets forth the two methods as follows:

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or * * *

(iv) they are produced entirely in the territory of Canada, Mexico and/or the United States but one or more of the non-originating materials falling under provisions for "parts" and used in the production of such goods does not undergo a change in tariff classification because—

(A) the goods were imported into the territory of Canada, Mexico and/or the United States in unassembled or disassembled form but were classified as assembled goods pursuant to general rule of interpretation 2(a), or

(B) the tariff headings for such goods provide for and specifically describe both the goods themselves and their parts and is not further divided into subheadings, or the subheadings for such goods provide for and specifically describe both the goods themselves and their parts, provided that such goods do not fall under chapters 61 through 63, inclusive, of the tariff schedule, and provided further that the regional value content of such goods, determined in accordance with subdivision (c) of this note, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and such goods satisfy all other applicable provisions of this note. For purposes of this Note, the term "material" means a good that is used in the production of another good, and includes a part or an ingredient.

Where non-originating starting materials are used, i.e., drip chamber, Y site, slide clamp, roller clamp, luer adapter, protection cap and cassette, we must examine whether the solution administration sets are "transformed in the territory of Canada, Mexico and/or the United States" pursuant to General Note 12(b)(ii)(A), HTSUS. As the completed solution administration sets are classified under subheading 9018.90.75, HTSUS, and subheading 9018.90.80, HTSUS, a transformation is evident when a change in tariff

classification occurs that is authorized by General Note 12(t)/90.46, HTSUS. General Note 12(t)/90.46, HTSUS, states:

A change to subheading 9018.90 from any other heading.

Therefore, any non-originating materials must come from another heading.

In this case, the non-originating materials, other than the cassette, are classified as parts under subheading 9018.90.80, HTSUS. A change in tariff classification does not occur pursuant to General Note 12(t)/90.46, HTSUS. Therefore, the solution administration sets manufactured from non-originating drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap are not eligible for preferential tariff treatment under the NAFTA pursuant to General Note 12(b)(ii), HTSUS.

An examination of General Note 12(b)(iv), HTSUS, is necessary because the non-originating materials used in the solution administration sets do not undergo a change in tariff classification pursuant to General Note 12(b)(ii), HTSUS, and they are classified under a tariff provision for parts. We note that General Note 12(b)(iv)(A), HTSUS, is inapplicable because the non-originating components imported into Mexico were not imported in an unassembled or disassembled form and, as entered into Mexico, were not classified as assembled pursuant to GRI 2(a).

Section 4(4) of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 CFR Appendix to Part 181), further sets forth the exceptions to the general requirement of a change in tariff classification in order for a good containing non-originating materials to be eligible for the NAFTA preference. In this regard Section 4(4)(b), provides, in pertinent part, that except for a good provided for in Chapters 61 through 63, HTSUS, a good will be considered to originate in the territory of a NAFTA country where:

(i) the good is produced entirely in the territory of one or more of the NAFTA countries,

(ii) one or more of the non-originating materials used in the production of the good do not undergo an applicable change in tariff classification because

(A) those materials are provided for under the Harmonized System as parts of the good, and

(B) the heading for the good provides for both the good and its parts and is not further subdivided into subheadings, or the subheading for the good provides for both the good and its parts,

(iii) the non-originating materials that do not undergo a change in tariff classification in the circumstances described in subparagraph (11) and the goods are not both classified as parts of goods under the heading or subheading referred to in subparagraph (ii)(B),

(iv) each of the non-originating materials that is used in the production of the goods and is not referred to in subparagraph (iii) undergoes an applicable change in tariff classification or satisfies any other applicable requirement set out in Schedule I,

(v) the regional value content of the good, calculated in accordance with section 6, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and

(vi) the good satisfies all other applicable requirements of the Appendix, including any applicable, higher regional value-content requirement provided for in section 13 or Schedule I.

"Production" is defined by General Note 12 (p), as "growing, mining, harvesting, fishing, trapping, hunting, manufacturing, processing or assembling a good." See also, Section 2(1), NAFTA Rules of Origin Regulations.

The solution administration sets meet the first two requirements of Section 4(4), NAFTA Rules of Origin Regulations. Pursuant to the definition of "Production", the solution administration sets with non-originating parts are produced entirely in the NAFTA territory of Canada. Additionally, the non-originating parts, other than the cassette, do not undergo an applicable change in tariff classification because the subheading (subheading 9018.90, HTS), provides for both the good (solution administration sets) and its parts (drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap).

We note that Section 2(3), NAFTA Rules of Origin Regulations state that:

For purposes of the Appendix: * * *

(c) "subheading" refers to any six-digit number, or the first six digits of any number, set out in the column "Heading/Subheading" in the Harmonized System; * * *.

Therefore, with respect to Section 4(4)(b) and, therefore, General Note 12(b)(iv), HTSUS, the term "subheading" refers to any six-digit number, or the first six digits of any number,

set out in column "Heading/Subheading" of the Harmonized System. In this case, the relevant subheading is subheading 9018.90, HTS.

Moreover, the solution administration sets do meet requirement (iii). The non-originating materials, i.e., drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap, which do not undergo a change in tariff classification under (ii), and the good itself, i.e., solution administration sets, are not both classified as parts of goods under the heading or subheading referred to in (ii)(B). However, given that subheading 9018.90 provides for both the good, i.e., solution administration sets, and the non-originating parts, i.e., drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap, the solution administration sets do meet this requirement.

Therefore, if the solution administration sets meet the applicable value content requirement in General Note 12(b)(iv)(B), HTSUS, and all other applicable requirements, they will qualify for the NAFTA tariff preference.

In disqualifying the Accuset and Gemini solution administration sets from NAFTA preferential tariff treatment, NY 895684 held, in essence, that General Note 12(b)(iv)(B), HTSUS, is applied at the 10 digit level. This determination is incorrect. As stated above, General Note 12(b)(iv)(B), HTSUS, concerning "parts", is applied at the six-digit level. See, Section 2(3)(C), NAFTA Rules of Origin Regulations.

Holding:

The solution administration sets, "Accuset" and "Gemini", will be considered "originating goods" pursuant to General Note 12(b)(iv)(B), HTSUS, upon meeting the applicable value content requirement and all other applicable requirements.

NY 895684 is modified as directed above.

JOHN DURANT,
Director,
Commercial Rulings Division.

**PROPOSED PARTIAL REVOCATION OF CUSTOMS RULING
LETTER RELATING TO TARIFF CLASSIFICATION OF A "DIRTY
BAG"**

ACTION: Notice of proposed partial revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that customs intends to revoke a ruling pertaining to the tariff classification of a "dirty bag."

DATE: Comments must be received on or before November 25, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482-7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to partially revoke a ruling pertaining to the tariff classification of a "dirty bag."

In New York Ruling Letter (NYRL) 870762, issued on February 6, 1992, by the Area Director of Customs, New York Seaport, a "dirty bag" was classified in subheading 3926.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "[o]ther articles of plastics and articles of other materials of heading 3901 to 3914: [o]ther: [o]ther: [o]ther." This ruling letter is set forth in Attachment A to this document. In NYRL 892433, dated November 30, 1993, Customs classified a similar article described as a "diaper bag" in subheading 4202.92.4500, HTSUS, which provides for "[t]runks, suitcases * * *, traveling bags, toiletry bags, knapsacks and backpacks, handbags * * * and similar containers, * * * of sheeting of plastics: [o]ther: [w]ith outer surface of sheeting of plastic or of textile materials: [t]ravel, sports and similar bags: [o]ther." NYRL 892433 is set forth as Attachment B to this document.

In Headquarters Ruling Letter (HRL) 955660, dated September 27, 1994, Customs Headquarters reconsidered NYRL 892433 and affirmed the classification of the "diaper bag" in subheading 4202.92.4500, HTSUS. This ruling letter is set forth in Attachment C to this document.

In light of the decision in HRL 955660, Customs is of the opinion that the classification of the "dirty bag" in subheading 3926.90.9090, HTSUS, was in error. Therefore, Customs intends to revoke NYRL 870762 to reflect the proper classification of this article in subheading 4202.92.4500, HTSUS. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling partially revoking NYRL 870762 is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 5, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 6, 1992.
CLA-39:S:N:N3G:221 870762
Category: Classification
Tariff No. 3926.90.9090 and 4202.92.4500

MR. JOHN M. PETERSON
NEVILLE, PETERSON & WILLIAMS
39 Broadway
New York, NY 10006

Re: The tariff classification of a "dirty bag" from China.

DEAR MR. PETERSON:

In your letter dated January 14, 1992, on behalf of Dolly, Inc., you requested a tariff classification ruling.

A sample of the product, identified as a "dirty bag," was included with your request. The product is a clear PVC pocket, measuring approximately 7 inches by 10 inches, with no gusset. There is a zippered opening 1½ inches from the top. Two snap tabs, each approximately 3¼ inches long, were sewn to the inside of the bag. You indicate in your letter that in the condition as imported, these snap tabs will be attached to the outer left and right top corners. The pocket is intended to be snapped inside a diaper changing bag and used as a container for soiled articles to keep them separate from clean articles inside the bag. The snaps enable the pouch to be removed from the bag and wiped clean. The pocket in itself is not a travel bag, but is a component of the baby diaper bag. It is not a pouch of the kind normally carried in the pocket or handbag. You indicate that the pocket insert will be imported both separately and together with the larger diaper bag into which it fits.

The applicable subheading for the dirty bag, when imported separately, will be 3926.90.9090, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics, other. The rate of duty will be 5.3 percent *ad valorem*.

When imported in the same shipment as the diaper bag, and in equal quantities, the pocket is classifiable as an entirety with the bag. You have indicated that the diaper changing bag will be manufactured of plastics. We assume that the bag will have an outer surface of plastic sheeting material.

The applicable subheading for a diaper changing bag having an outer surface of plastic sheeting material will be 4202.92.4500, HTS, which provides for travel, sports and similar bags with outer surface of plastic sheeting or of textile materials, other. The rate of duty will be 20 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

New York, NY, November 30, 1993.

CLA-2-42:S:N:N6:341 892433

Category: Classification

Tariff No. 4202.92.4500

MR. PETER J. ALLEN
NEVILLE, PETERSON & WILLIAMS
COUNSELLORS AT LAW
39 Broadway
New York, NY 10006

Re: The tariff classification of a travel bag from China.

DEAR MR. ALLEN:

In your letter dated November 11, 1993, on behalf of Dolly, Inc., you requested a tariff classification ruling for a travel bag.

The sample submitted, no style number indicated, described as a "Diaper Bag", is a zippered travel pouch composed of clear PVC vinyl designed to contain personal effects while traveling. It is unlined and measures approximately 10 inches in width by 7 inches in height. A vinyl loop has been provided to hang or carry the bag. Although you have indicated that the article is a diaper pouch, it is nevertheless essentially a travel bag of the kind used to contain various personal effects.

The applicable subheading for the travel bag of clear PVC vinyl will be 4202.92.4500, Harmonized Tariff Schedule of the United States (HTS), which provides for travel, sports and similar bags, with outer surface of sheeting of plastic, other. The duty rate will be 20 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,

Area Director,

New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC, September 27, 1994.

CLA-2-CO:R:C:T 955660 NLP

Category: Classification

Tariff No. 4202.92.4500

MR. PETER J. ALLEN
NEVILLE, PETERSON & WILLIAMS
80 Broad Street, Suite 3400
New York, NY 10004

Re: NYRLs 892433, 870762, 884087, 874907 headings 3923, 3926 and 4202; Legal Note 2(h) to chapter 39; Additional U.S. Note 1 to chapter 42; Legal Note 2(a) to Chapter 42; Explanatory Notes to heading 4202; travel, sports and similar bags; HRLs 087419, 954965, 954970, 085526, 082218, 082609, 087026 and 085769.

DEAR MR. ALLEN:

On November 30, 1993, our New York office issued to you, on behalf of your client, Dolly, Inc., ("Dolly") New York Ruling Letter (HRL) 892433, which classified a "Diaper bag" in

subheading 4202.92.4500, Harmonized Tariff Schedule of the United States (HTSUS). In a letter to Customs Headquarters, dated December 20, 1993, you requested, on behalf of Dolly, a reconsideration of this ruling. In addition, on July 13, 1994, you met with my staff attorneys to discuss your position concerning the classification of the "Diaper bag". You have also provided us with three samples of this bag.

Facts:

The article at issue is called a "dirty diaper bag". You informed us in your submission and again in the meeting that was held on July 13, 1994, that the sample described in NYRL 892433 is not identical in all respects to the merchandise that will be imported. The bag in NYRL 892433 had a zipper closure, while the article, in its condition of importation, will not have a zipper closure. As a result, we will reconsider NYRL 892433 as it pertains to the bag with a zipper closure and we will also provide you with a classification of the bags in the condition in which Dolly intends to import them.

The diaper bags at issue are flat, vinyl, pouch-like bags. The first sample has a metal zipper opening and measures approximately 7 inches by 10 inches. The second and third samples, which measure 8 inches by 10 inches, will each have a vinyl flap that extends from the top of the bag and overlaps the opening. This flap will be sewn along the edges but will have no other means of closure. The sides of the bags are made of clear vinyl (PVC) sheeting and the bags contain no gussets. The edges have been closed by means of stitched plastic piping. The first and second samples each have a sewn-on loop for attachment to the main changing bag, while the third bag does not feature a loop.

While the subject articles will be imported separately, they will be sold with a diaper changing bag. Used together, the diaper changing bag and the dirty diaper bag will permit persons traveling with a baby to transport the necessary changing supplies while segregating the soiled diapers from the rest of the contents of the changing bag. The articles at issue are intended for use in transporting soiled diapers.

In addition to the subject dirty diaper bags, you submitted a diaper changing set consisting of the outer carrying bag, a bottom stiffener insert and a changing pad. The set was submitted to illustrate the manner in which the bags with the loops are attached to the outer changing bag. A strap attached to the inside of the changing bag permits the dirty diaper bag to be secured within the changing bag and permits it to be located and removed easily by grasping the strap. It also permits the user to remove the other contents of the changing bag without the need of holding the dirty diaper bag apart.

NYRL 892433 classified the dirty diaper bag with a zipper closure in subheading 4202.92.4500, HTSUS, which provides for the following "[t]runks, suitcases * * *, traveling bags, toiletry bags, knapsacks and backpacks, handbags * * * and similar container, * * * of sheeting of plastics: [o]ther: [w]ith outer surface of sheeting of plastic or of textile materials: [t]ravel, sports and similar bags: [o]ther." It is your position that the bags at issue are classifiable in subheading 3923.29.0000, HTSUS, which provides for "[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [s]acks and bags (including cones): [o]f other plastics." In the alternative, you argue that the pouches are classifiable in subheading 3926.90.9090, HTSUS, which provides for [o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther: [o]ther."

Issue:

Is the "dirty diaper bag" classifiable as a travel, sports and similar bag in subheading 4202.92.4500, HTSUS, or as a sack or bag in subheading 3923.29.0000, HTSUS, or as an other article of plastics in subheading 3923.90.9090, HTSUS?

Law and Analysis:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

Heading 3923, HTSUS, provides for "[a]rticles for the conveyance or packing of goods, of plastics; * * *." Legal Note 2(h) to Chapter 39, HTSUS, precludes from classification therein " * * * trunks, suitcases, handbags or other containers of heading 4202." Accordingly, our first determination is whether the dirty diaper bags are classifiable under head-

ing 4202, HTSUS, and if they are items classifiable in heading 4202, HTSUS, then they are precluded from classification in chapter 39, HTSUS.

Heading 4202, HTSUS, provides for the following:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular case, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

Additional U.S. Note 1 to Chapter 42, HTSUS, states:

For purposes of heading 4202, the expression **'travel, sports and similar bags'** means goods * * * of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to heading 4202 state, on page 613, that this heading does not cover "[a]rticles which, although they may have the character of containers, are not similar to those enumerated in the heading * * *"

The articles at issue are bags designed to transport "personal effects" (i.e., dirty diapers and, given the size of the bags, other toiletry or hygiene articles) "during travel" (i.e., from one location to another). Essentially, the purpose of the bags is to organize, protect and transport these effects. The cases will be used inside of another container, for example, the diaper changing bag. We note that as there is no qualification of the term "during travel", this office will not place limits on the duration or distance of any journey in order for it to constitute travel within the purview of the U.S. Note set forth above. Travel may constitute relatively minor journeys such as commutes to work or lengthier trips of greater duration. As the bags are designed to transport personal effects during travel, it is our position that they are all classifiable as travel, sports or similar bags in subheading 4202.92.4500, HTSUS. See, HRL 087419, dated July 12, 1990, wherein Customs recognized that travel bags are articles designed to aid in organizing and providing a convenient carrying case for an individual.

In addition, we note that the subject articles are similar to cosmetic cases, which we have classified as travel, sports and similar bags. For example, in HRL 954965, dated September 20, 1993, we classified cosmetic cases made of plastic sheeting as travel bags as they were designed to transport personal effects. We stated that, given their function, these cases were more specifically described as travel bags than as articles designed to be carried in the handbag. See also, HRL 954970, dated September 20, 1993, wherein we classified a bag made of plastic sheeting that was used to hold rechargeable Remington electric shavers, with a secondary usage being for cosmetics, in subheading 4202.92.4500, HTSUS.

Furthermore, there is no prerequisite that containers of heading 4202, HTSUS, must be specially fitted to accommodate a particular object, nor need they necessarily possess handles or straps, nor must they be constructed with rigid exteriors. Therefore, the fact that the subject bags do not have gussets or carrying handles does not preclude them from classification as travel, sports or similar bags. See, HRL 952700, dated December 23, 1992. We also note that even though two of these bags do not have either a zipper closure or a slide fastener closure, this also does not preclude their classification in heading 4202, HTSUS. It is our position that the flap closure will ensure that the items won't fall out and it will be sufficient to enclose the items the bags are meant to transport. Thus, as we find that the bags are classifiable as travel, sports and similar bags in heading 4202, HTSUS, they cannot be classified under either heading 3923, HTSUS, or heading 3926, HTSUS, by reason of Legal Note 2(h) to Chapter 39, HTSUS.

However, it is your position that the subject bags are not classifiable in heading 4202, HTSUS, and are more appropriately provided for in heading 3923, HTSUS. First, the items are composed of plastics, as PVC sheeting comprises practically the entire surface area of the bags and provides their visual effect. Second, the bags are intended for use in conveying other articles. Their purpose is to carry soiled diapers inside the diaper changing bag and, at the same time, they segregate the soiled diapers from the other contents in the diaper changing bag. The vinyl sheeting of the bags provides a moisture-proof barrier to protect the inside of the changing bag. In support of this position, you cite the ENs to

heading 3923, which state that plastic bags are included within the merchandise covered by this heading. In addition, you cite HRL 082218, dated February 27, 1990, and HRL 082660, dated February 23, 1990, in which Customs classified plastic bags used for hospital patients in heading 3923, HTSUS. You also note HRL 085526, dated December 21, 1989, and NYRL 884087, dated April 7, 1993, which classified pencil pouches made of plastic sheeting in heading 3923, HTSUS.

In HRL 082218, certain polyethylene plastic bags used by hospitals to store the personal belongings of patients were classified in heading 3923, HTSUS. We concluded in this decision that the bags "could not be reused" and they were not of the type contemplated by heading 4202, HTSUS, by virtue of Note 2(a) to Chapter 42, HTSUS, which states that heading 4202 does not cover "bags made of sheeting of plastics, whether or not printed, with handles, not designed for prolonged use (heading 3923)." The bags in HRL 082660 served the same function as the bag in HRL 082218 and could also be used as refuse bags, which are provided for in the ENs to heading 3923, HTSUS.

By implication, bags composed of plastic sheeting which are designed for prolonged use may be classified in heading 4202, HTSUS. In the instant case we are of the opinion that the subject bags have been designed for repetitive use. The plastic material is reinforced on each side with stitched plastic piping and appears thick enough to resist rips and tears. These bags are more substantial than the patient bags described above. As stated above, they are similar to travel and cosmetic bags and, therefore, are the type of bag to be classifiable in heading 4202, HTSUS.

In HRL 085526 we dealt with the classification of two styles of pencil cases made of plastic sheeting. The first measured approximately 9½ inches by 6 inches with no gusset and had an interlocking ziplock-type closure. The second style measured approximately 11 inches by 6½ inches with no gusset and it had a flap and metal closure. Both styles had a series of stamped holes which could be punched out to allow placement onto rings of a looseleaf binder and both were intended to contain various school supplies. We held that these notebook pouches of plastic which were designed to hold school supplies and to facilitate their conveyance between various locations were classifiable in subheading 3923.29.0000, HTSUS. See also, NYRL 884087, dated April 7, 1993.

In arriving at this classification, Customs considered the applicability of subheading 4202.32, HTSUS, and noted that in a prior ruling, HRL 085356 dated November 20, 1989, pencil pouches were classified in heading 4202, HTSUS, as their size and generic characteristic strongly suggested they were to be carried in handbag. However, the pencil cases in HRL 085526 were designed to be carried inside a looseleaf binder, not a pocket or handbag, and this was evidenced by the presence of stamped/punch out holes strategically located to accommodate looseleaf binder rings. Additionally, the pouches were considered too large to be placed in a pocket or handbag. Therefore, we held that these pouches were more specifically classifiable in subheading 3923.20.0000, HTSUS.

Furthermore, we note that other pencil pouches that served similar functions to those classified in HRL 085526, but were not designed to be placed in a looseleaf binder and were smaller in dimension, have been classified in heading 4202, HTSUS. For example, in HRL 087026, dated July 24, 1990, we classified as a set a PVC pencil pouch that measured 4¼ inches by 8 inches, a pencil, an eraser and a ruler. As the pencil pouch provided the set's essential character it was classifiable in subheading 4202.32.2000, HTSUS. In HRL 085769, dated January 29, 1990, we classified two PVC cases in heading 4202, HTSUS. The first article was a PVC padded flat case with a slide fastener opening and which was outlined with a nylon cord piping along the seam in heading 4202, HTSUS. The second case was a 2 inch gusseted, unlined case with a contrasting slide fastener opening. The slide fastener overhung on either end of the pouch by 2½ inches and could be snapped to the side of the case. A nylon cord rope was attached to the slide fastener to aid in opening the pouch. The entire case measured 8 inches by 4 inches. As both items qualified as a type of bag or pouch designed for transporting pencils or pens and which is normally carried in the pocket or handbag, they were classified in heading 4202, HTSUS. See also, NYRL 877475, dated August 26, 1992, in which Customs classified a pencil pouch constructed of vinyl that measured approximately 8½ inches by 4 inches in subheading 4202.32.2000, HTSUS.

The articles in the instant case are distinguishable from the pencil pouches classified in HRL 085526 and NYRL 884887. As HRL 085526 points out, the pencil pouches were designed to be carried inside a looseleaf binder and they were considered too large to be placed in the pocket or handbag. Therefore, the pouches were not classifiable in subhead-

ing 4202.32, HTSUS. In the instant case, the dirty diaper bags are designed to be carried inside a diaper changing bag, an article classifiable in heading 4202, HTSUS. In addition, while the sizes of the subject bags might preclude their classification in subheading 4202.32, HTSUS, their use, function and design do not preclude their classification in heading 4202, HTSUS.

Moreover, a comparison of the language of heading 3923, HTSUS, and heading 4202, HTSUS, reveals that the former heading provides for goods of a commercial nature (i.e., containers for packing and shipping bulk or commercial goods), whereas heading 4202, HTSUS, provides for containers used to convey personal articles in general. Enumerated exemplars in the ENs to heading 3923 include such articles as boxes, cases, crates, sacks, bags, carboys, bottles, flasks, spools, cops, bobbins, stoppers, lids, caps, other closures and similar articles. It is clear that this heading provides for cases and containers of bulk goods and commercial goods not personal items. Conversely, heading 4202, HTSUS, provides for a variety of containers ranging from luggage to sports and travel bags, to fitted cases, and assorted similar articles. The key distinction is "that heading 3923, HTSUS, provides for more industrial or commercial type containers intended to transport bulk or commercial articles while heading 4202, HTSUS, provides for, in part, containers designed to transport the assorted personal belongings of an individual whether it be food, clothing, documents, tools, etc. * * *." See, HRL 954072, dated September 2, 1993. Therefore, as the subject bags will store, transport and protect belongings of an individual, they are classifiable in heading 4202, HTSUS.

Holding:

NYRL 892433 is affirmed. The dirty diaper bag with a zipper is classifiable in subheading 4202.92.4500, HTSUS. The applicable rate of duty is 20% *ad valorem*.

The dirty diaper bags without zipper closures are also classifiable in subheading 4202.92.4500, HTSUS.

We note that this ruling is inconsistent with NYRL 870762, dated February 6, 1992, which was also issued to you on behalf of Dolly, Inc. In addition, based on our discussion of the scope of heading 3923, HTSUS, the pencil pouches at issue in HRL 085526 and NYRL 884887 were incorrectly classified. Therefore, pursuant, to section 625(c)(1) of Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), we intend to take appropriate action to revoke NYRLs 870762, 884887 and HRL 085526 in accordance with the position taken in this ruling.

JOHN DURANT,

*Director,
Commercial Rulings Division.*

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC

CLA-2 CO:R:C:T 957046 ch

Category: Classification

Tariff No. 4202.92.4500

MR. JOHN M. PETERSON
NEVILLE, PETERSON & WILLIAMS
80 Broad Street, Suite 3400
New York, NY 10004

Re: Reconsideration and partial revocation of New York Ruling Letter 870762; classification of a dirty diaper bag; Headquarters Ruling Letter 955660.

DEAR MR. PETERSON:

In New York Ruling Letter (NYRL) 870762, an article described as a "dirty bag" was classified under subheading 3926.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), and a diaper changing bag was classified under subheading 4202.92.4500, HTSUS. We have had occasion to review NYRL 870762 and find that the classification of the "dirty bag" under subheading 3926.90.9090, HTSUS, was in error.

Facts:

In NYRL 870762, the "dirty bag" was described as follows:

The product is a clear PVC Pocket, measuring approximately 7 inches by 10 inches, with no gusset. There is a zippered opening 1½ inches from the top. Two snap tabs, each approximately ¾ inches long, were sewn to the inside of the bag. You indicate in your letter that in the condition as imported, these snap tabs will be attached to the outer left and right top corners. The Pocket is intended to be snapped inside a diaper changing bag and used as a container for soiled articles to keep them separate from clean articles inside the bag. The snaps enable the pouch to be removed from the bag and wiped clean.

The dirty bag was imported both individually and as part of a larger diaper changing bag. In NYRL 870762, we classified the dirty bag, when imported separately, in subheading 3926.90.9090, HTSUS, which provides for "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther: [o]ther."

Issue:

What is the proper tariff classification of the dirty bag?

Law and Analysis:

In NYRL 892433, a "diaper bag" was classified in subheading 4202.92.4500, HTSUS, which provides for "[t]runks, suitcases * * * ; traveling bags, toiletry bags, knapsacks and backpacks, handbags * * * and similar containers, * * * of sheeting of plastics: [o]ther: [w]ith outer surface of sheeting of plastic or of textile materials: [t]ravel, sports and similar bags: [o]ther." The "diaper bag" is substantially similar to the "dirty bag" described in NYRL 870762. subsequently, you directed our attention the disparity in tariff treatment accorded to the two articles. In Headquarters Ruling Letter (HRL) 955660, dated September 27, 1994, we affirmed NYRL 870762 and concluded that the diaper bag was akin to travel, sports and similar bags of heading 4202, HTSUS.

As the articles at issue in both NYRL 870762 and NYRL 892433 are substantially similar in design and purpose, we conclude that the classification of the dirty bag in heading 3926, HTSUS, was in error. Therefore, in accordance with the analysis set forth in HRL 955660, we are partially revoking NYRL 870762 to reflect its proper classification in subheading 4202.92.4500, HTSUS.

Holding:

The dirty bag is classifiable in subheading 4202.92.4500, HTSUS. The applicable rate of duty is 20 percent *ad valorem*.

Pursuant to 19 CFR 177.9(d), NYRL 870762, dated February 2, 1992, is hereby revoked in part.

JOHN DURANT,
Director,
Commercial Rulings Division.

**PROPOSED MODIFICATION OF CUSTOMS RULING LETTER
RELATING TO TARIFF CLASSIFICATION OF DIPHENYL
SULFONE**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NYRL) 838474, dated March 30, 1989, to reflect the proper classification of Diphenyl Sulfone, one of the chemicals covered by the ruling.

DATE: Comments must be received on or before November 25, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482-7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify NYRL 838474, dated March 30, 1989, to reflect the proper classification of Diphenyl Sulfone, one of the chemicals covered by the ruling.

In NYRL 838474, dated March 30, 1989, Diphenyl Sulfone, one of the chemicals covered by the ruling was classified as an aromatic pesticide under the provision for other organo-sulfur compounds, aromatic pesticides, subheading 2930.1000, Harmonized Tariff Schedule of the United States (HTSUS), with duty at the general rate of 12.5 percent *ad valorem*. This ruling letter is set forth in Attachment A to this document.

Customs intends to modify NYRL 838474 to reflect the proper classification of Diphenyl Sulfone. New information submitted to Customs indicates that the chemical is not used as a pesticide or used as an ingre-

dient in the manufacture of a pesticide, and that no products are registered with the United States Environmental Protection Agency that contain Diphenyl Sulfone as an active ingredient. Accordingly, the chemical is not a pesticide. Before taking this action, consideration will be given to any written comments timely received. The proposed Headquarters Ruling Letter 956977, modifying NYRL 838474 to reflect the proper classification of Diphenyl Sulfone is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the publication of this notice.

Dated: October 6, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 30, 1989.
CLA-2-29:S:N:N1:240 838474
Category: Classification
Tariff No. 2921.42.2000, 2930.90.1000,
2930.90.2000, and 2930.90.5030

MR. SEAN F CONDREN
PROCHIMIE
488 Madison Avenue
New York, NY 10022

Re: The tariff classification of several chemical products from France.

DEAR MR. CONDREN:

In your letter dated March 15, 1989, you requested a tariff classification ruling.

The applicable HTS subheadings and rates of duties for the chemicals you are interested in are as follows:

Product	HTS	Duty (percent ad valorem)
2,5 Dichloroaniline (CAS 95-82-9)	2921.42.2000	5.8
Dichloro diphenylsulfone (CAS 80-07-9)	2930.90.2000	6.7
Diisopropyl Xanthogen Disulfide (CAS 105-65-7) ...	2930.90.5030	3.7
Diphenyl Sulfone (CAS 127-63-9)	2930.90.1000	12.5
Dixylenol Sulfone (CAS 13288-70-5)	2930.90.2000	6.7

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC

CLA-2 CO:R:C:F 956977 K

Category: Classification

Tariff No. 2930.90.2800

MR. SEAN E. CONDREN
PROCHIMIE INTERNATIONAL INC.
488 Madison Avenue
New York, NY 10022

Re: Tariff Classification of Diphenyl Sulfone; Modification of New York Ruling Letter (NYRL) 838474.

DEAR SIR:

In response to your letter dated March 15, 1989, the Customs Service issued NYRL 838474, dated March 30, 1989, which held that one of the chemicals that was subject to the ruling, Diphenyl Sulfone, was classified under the provision for other organo-sulfur compounds, aromatic pesticides, subheading 2930.90.1000, Tariff Schedule of the United States (HTSUS), with duty at the general rate of 12.5 percent *ad valorem*. This letter is to inform you that NYRL 838474 no longer reflects the views of the Customs Service. The following represents our position.

Facts:

In NYRL 838474, dated March 30, 1989, one of the chemicals that was the subject of the ruling, Diphenyl Sulfone was classified under the provision for other organo-sulfur compounds, aromatic pesticides, subheading 2930.90.1000, HTSUS, with duty at the general rate of 12.5 percent *ad valorem*.

It has now come to our attention in a letter dated April 26, 1994, from the United States Environmental Protection Agency that "there are no registered pesticide products in the U.S. that contain Diphenyl Sulfone as an active ingredient." It has also come to our attention that a domestic manufacturer of Diphenyl Sulfone states that no other use has been found for Diphenyl Sulfone outside the plastics industry.

Issue:

The issue is whether Diphenyl Sulfone is classifiable as an other aromatic pesticide in subheading 2930.90.1000, HTSUS.

Law and Analysis:

Diphenyl Sulfone is an organo-sulfur compound classifiable in heading 2930, HTSUS. However, based on the above information, we conclude that Diphenyl Sulfone is not used as a pesticide or used as an ingredient in the manufacture of a pesticide. Therefore, Diphenyl Sulfone is not classified as an other aromatic pesticide in subheading 2930.90.1000, HTSUS. Accordingly, the correct classification is in subheading 2930.90.2800, HTSUS.

Holding:

Diphenyl Sulfone is classifiable in subheading 2930.90.2800, HTSUS, under the provision for organo-sulfur compounds: *** Other *** Aromatic: *** Other *** Other, with duty at the general rate of 6.7 percent *ad valorem*.

NYRL 838474, dated March 30, 1989, covering the classification of Diphenyl sulfone is modified to reflect the proper classification of this specific merchandise.

JOHN DURANT,

Director,

Commercial Rulings Division.

COPYRIGHT, TRADEMARK, AND
TRADE NAME RECORDATIONS

(No. 10-1994)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of August 1994 follow. The last notice was published in the CUSTOMS BULLETIN on September 7, 1994.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482-6960.

Dated: October 6, 1994.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

10/03/94
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IPR RECORDATIONS ADDED IN AUGUST 1994

PAGE
DETAIL 1

U.S. CUSTOMS SERVICE

51

REC NUMBER	EXP DT	NAME OF COP, THK, TMM OR MSK	OTHER NAME	RES
COP9400207	19940804	PTUOCHIO	HAIT DISNEY COMPANY	N
COP9400208	20140804	TOUCAN HAMMER TOY	ZEI HONG PLASTICS CO., LTD.	N
COP9400209	20140808	CHICKEN HAMMER TOY	ZEI HONG PLASTICS CO., LTD.	N
COP9400210	20140808	MANIX DESIGN 934 PSM	MANIX CLOCK, INC.	N
COP9400211	20140808	MANIX DESIGN 935 PSM	MANIX CLOCK, INC.	N
COP9400212	20140809	MANIX DESIGN 936 PSM	MANIX CLOCK, INC.	N
COP9400213	20140809	MANIX DESIGN 937 PSM	MANIX CLOCK, INC.	N
COP9400214	20140817	CHENG CORP CHRISTMAS DESIGN 1991 SERIES I	CHENG CORP	N
COP9400215	20140817	POLICE PATROL WITH HELICOPTER	REGENCY MERCHANDISE INC.	N
COP9400216	20140817	SECRET POLICE CAR	REGENCY MERCHANDISE INC.	N
COP9400217	20140817	ROYAL PLACE DAMASK DESIGN	H-C IMPORTS INC.	N
COP9400218	20140817	MICROSOFT MS-DOS 6.2, STEP-UP	MICROSOFT CORPORATION	N
COP9400219	20140817	MICROSOFT MS-DOS 6.2, SPOGRADE	MICROSOFT CORPORATION	N
COP9400220	20140817	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400221	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400222	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400223	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400224	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400225	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
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COP9400228	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
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COP9400230	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
COP9400231	20140823	BASE CODE, AHA-1520859 MCODE 432101-00 REV.A	ADAPTEC INC.	N
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TMK9400511	20031211	RAIDERS AND HELMET DESIGN	LOS ANGELES RAIDERS	Y
TMK9400512	20031211	MYLAR HELMET DESIGN	MYLAR	Y
TMK9400513	20020610	MYLAR	E. I. DU PONT DE NEMOURS COMPANY	N

10-03/94
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U.S. CUSTOMS SERVICE
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PAGE 2
DETAIL

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THK9400519	20031214	19940817	PHOENIX CARDINALS HELMET DESIGN	CHICAGO BEARS FOOTBALL CLUB	Y
THK9400520	20031228	19940817	DETROIT TIGERS	888 HOLDINGS INC.	Y
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THK9400522	20031207	19940817	HOUSTON OILERS HELMET DESIGN	GREEN BAY PACKERS, INC.	Y
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THK9400525	20031207	19940817	KANSAS CITY CHIEFS	INDIANAPOLIS COLTS, INC.	Y
THK9400526	20031207	19940817	KANSAS CITY CHIEFS	KANSAS CITY CHIEFS	Y
THK9400527	20031207	19940817	NEW YORK JETS	NEW YORK JETS	Y
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THK9400529	20031207	19940817	SAN FRANCISCO 49ERS	SAN FRANCISCO 49ERS	Y
THK9400530	20031214	19940817	TAMPA BAY BUCCANERS	TAMPA BAY AREA NFL FOOTBALL, INC.	Y
THK9400531	20031221	19940817	TAMPA BAY BUCCANERS	TAMPA BAY AREA NFL FOOTBALL, INC.	Y
THK9400532	20040111	19940817	NEW YORK JETS	NEW YORK JETS FOOTBALL CLUB	Y
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THK9400534	20031221	19940817	PITTSBURGH STEELERS	PITTSBURGH STEELERS	Y
THK9400535	20031221	19940817	CHARGERS HELMET DESIGN	CHARGERS FOOTBALL COMPANY	Y
THK9400536	20031214	19940817	INDIANAPOLIS COLTS	INDIANAPOLIS COLTS, INC.	Y
THK9400537	20040601	19940817	NEUTROGENA	NEUTROGENA CORPORATION	Y
THK9400538	19921021	19940817	BOSS	BROOKHURST, INC.	Y
THK9400539	19921002	19940817	PHILADELPHIA EAGLES	PHILADELPHIA EAGLES	Y
THK9400540	20031207	19940817	PITTSBURGH STEELERS	PITTSBURGH STEELERS	Y
THK9400541	20031207	19940817	CHARGERS	CHARGERS	Y
THK9400542	20031207	19940817	INDIANAPOLIS COLTS	INDIANAPOLIS COLTS, INC.	Y
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THK9400544	20030209	19940817	BEVERLY HILLS POLO CLUB WITH DESIGN	BEVERLY HILLS POLO CLUB WITH DESIGN	Y
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THK9400546	19920221	19940817	AC	AC	Y
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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN AUGUST 1994

PAGE 3
DETAIL

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THK9400584	19940823	20060406	THE GREATEST SHON ON EARTH	RINGLING BROS. BARMUM & BAILEY	Y
THK9400585	19940823	20030112	THE GREATEST SHON ON EARTH	RINGLING BROS. BARMUM & BAILEY	Y
THK9400586	19940823	20030112	SABOTEK WITH DESIGN	SABOTEK CORPORATION	Y
THK9400587	19940823	20021124	AMERICA PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400588	19940823	20020818	PORTFOLIO PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400589	19940823	20020804	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400590	19940823	20010507	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400591	19940823	20070721	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
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THK9400594	19940823	20061111	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400595	19940823	20060603	AMERICA & DESIGN	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400596	19940823	20040529	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400597	19940823	20010630	PORTFOLIO	PERRY ELLIS INTERNATIONAL INC.	Y
THK9400598	19940823	20030823	PERRY ELLIS	PERRY ELLIS INTERNATIONAL INC.	Y

SUBTOTAL RECORDATION TYPE 71

TOTAL RECORDATIONS ADDED THIS MONTH 111

PUBLIC MEETINGS IN SAN JOSE, CALIFORNIA, ATLANTA, GEORGIA, AND ST. LOUIS, MISSOURI ON CUSTOMS AUTOMATED EXPORT SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of meetings.

SUMMARY: This notice announces the locations and dates of public meetings to be held in San Jose, California, Atlanta, Georgia, and St. Louis, Missouri on the development of the Automated Export System (AES). These three meetings are being held to (1) give Customs managers an opportunity to provide exporters information related to the development of AES and (2) give exporters an opportunity to ask questions, make suggestions, and provide Customs with informal ideas related to AES design and functionality. These meetings are being coordinated with the Bureau of the Census and the International Trade Commission of the Department of Commerce.

DATES:

San Jose: October 12, 1994 commencing at 8:30 a.m. and again at 1 p.m.

Atlanta: October 25, 1994 commencing at 9 a.m. and again at 1 p.m.

St. Louis: October 27, 1994 commencing at 2 p.m.

ADDRESSES:

San Jose: San Jose McEnery Convention Center, Room K, 150 West San Carlos Street, San Jose, California.

Atlanta: Urban Life Center, Georgia State University, Piedmont Avenue, Atlanta, Georgia.

St. Louis: Ramada-Henry VIII Hotel and Conference Center, 4690 North Lindberg Boulevard, St. Louis, Missouri.

FOR FURTHER INFORMATION CONTACT:

San Jose Meeting: Foreign Trade Division, U.S. Bureau of the Census (301) 763-5186; Pre-registration Fax: (301) 763-5070.

Atlanta Meeting: Atlanta Regional Office, U.S. Bureau of the Census, (404) 730-3833; Pre-registration Fax: (404) 730-3835.

St. Louis Meeting: World Trade Club of St. Louis, Inc., (314) 725-9605, Pre-registration Fax: (314) 725-4889.

General AES Questions: Lorna Finley, AES Development Team, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 7331, Washington, DC., 20229, (202) 927-0280.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a document published in the Federal Register on June 13, 1994, (59 FR 30383) Customs announced its intention of developing an Automated Export System (AES) and informed the public that a series of meetings would be held around the country regarding the AES. This

notice is being issued to inform the public of the dates and times of additional meetings which will be held in San Jose, California, Atlanta, Georgia, and St. Louis, Missouri.

Since AES is in the very early design stage, the AES Development Team, in coordination with the Bureau of the Census and the International Trade Administration of the Department of Commerce will be holding this series of three meetings which will focus on exporters for the purpose of (1) giving Customs managers an opportunity to provide exporters information related to the development of AES and (2) giving exporters an opportunity to ask questions, make suggestions, and provide Customs with informal ideas related to AES design and functionality. Each meeting opens with a short presentation on export processing, past, present and future. After this presentation, the floor is open to all attendees for general informal discussion of the AES program.

In this document, Customs is announcing the following public meetings on AES.

1. *San Jose:*

October 12, 1994. Two meetings. Each will provide the same information. The first will commence at 8:30 a.m., and the second at 1 p.m.

San Jose McEnery Convention Center, Room K, 150 W. San Carlos Street, San Jose, CA.

Point of Contact: Foreign Trade Division, U.S. Bureau of the Census (301) 763-5186; Pre-registration Fax (301) 763-5070.

2. *Atlanta:*

October 25, 1994. Two meetings. Each will provide the same information. The first will commence at 9 a.m., and the second at 1 p.m.

Urban Life Center, Georgia State University, Piedmont Avenue and Decatur Street, Atlanta, GA.

Point of Contact: Atlanta Regional Office, U.S. Bureau of the Census (404) 730-3833; Pre-registration Fax (404) 730-3835.

3. *St. Louis:*

October 27, 1994, one meeting, commencing at 2 p.m.

Ramada-Henry VIII Hotel and Conference Center, 4690 North Lindberg Boulevard, St. Louis, MO.

Point of Contact: World Trade Club of St. Louis, Inc., (314) 725-9605, Pre-registration Fax (314) 725-4889.

In order to ensure that overcrowding does not result, persons planning to attend a meeting are requested to preregister by contacting the telephone or Fax numbers provided above for the city where they plan on attending in advance of the meeting date.

Dated: October 5, 1994.

HARVEY B. FOX,

Director,

Office of Regulations and Rulings.

[Published in the Federal Register, October 11, 1994 (59 FR 51479)]

TARIFF CLASSIFICATION OF IMPORTED GLASSWARE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed change of practice; solicitation of comments.

SUMMARY: This notice advises the public that Customs proposes a change of practice regarding the tariff classification of three classes of imported glassware: "containers of glass used for the conveyance or packing of goods", "preserving jars of glass" and "glassware of a kind used for table or kitchen purposes". The principal use of these classes or kinds of glassware, whether it be conveying or packing solid or liquid products, home canning or household storage, determines its classification.

After intensive review of the three classes of imported glassware, it has been determined advisable to set forth factors which Customs proposes to use when determining whether merchandise falls within a particular class or kind.

Customs proposes that "containers of glass used for the conveyance or packing of goods" includes glass articles that are part of the exchange or buying and selling of commodities that are principally used to convey a product to a consumer who uses the product and then discards the container.

Customs proposes that "preserving jars of glass" includes only various glass articles which are the typical size and shape of "Mason-type" jars. Because the U.S. Department of Agriculture (USDA) has determined that glass jars with wire bails and glass caps (non "Mason-type") are not recommended for home canning, and these type of jars are often advertised and sold in sets of varying sizes for use in the storage of dry goods in the home, Customs proposes to change its practice of classifying them as "preserving jars of glass" to the more appropriate class, glassware of a kind used for table or kitchen purposes.

Finally, Customs proposes that the class "glassware of a kind used for table or kitchen purposes" includes glass household storage articles.

By this action, those rulings which are inconsistent with Customs proposed change of practice would be revoked. Before adopting this proposed change of practice, consideration will be given to any written comments regarding the scope of all three of these classes (especially the characteristics which are indicative of each class) which are timely submitted in response to publication of this document.

DATE: Comments (preferably in triplicate) must be received on or before December 12, 1994.

ADDRESS: Written comments may be submitted to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1301 Constitution Ave. N.W. (Franklin Court) Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W. Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Metals and Machinery Classification Branch, (202) 482-7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs proposes a change of practice involving the tariff classification of three classes of imported glass articles under the Harmonized Tariff Schedule of the United States (HTSUS). This requires an examination of subheadings 7010.90.50 and 7013.39, HTSUS.

The HTSUS subheadings read as follows:

- 7010.90.50 Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: [o]ther: [o]ther containers (with or without their closures)
- 7013.39 [g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): [g]lassware of a kind used for table, (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: [o]ther

Subheadings 7010.90.50 and 7013.39, HTSUS, are considered "use" provisions. There are two principal types of classification by use:

- (1) according to the use of the class or kind of goods to which the imported article belongs; and
- (2) according to the actual use of the imported article.

Use according to the class or kind of goods to which the imported article belongs is more prevalent in the tariff schedule. A few tariff provisions expressly state that classification is based on the use of the class or kind of goods to which the imported article belongs. However, in most instances, this type of classification is inferred from the language used in a particular provision.

If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that: [i]n the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind. While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions.

However, the U.S. Court of International Trade (CIT) has provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind.

They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See: *Kraft, Inc. v. United States*, USITR, 16 CIT 483, (June 24, 1992) (hereinafter *Kraft*); *G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

Tariff classification of goods controlled by actual use is specifically provided for in sections 10.131-10.139, Customs Regulations [19 CFR 10.131-10.139]. According to these regulations, an actual use provision is satisfied if: (1) such use is intended at the time of importation, (2) the article is so used, and (3) proof of such use is furnished within three years after the date the article has been entered.

Currently, tariff classification under both subheading 7010.90.50 and 7013.39, HTSUS, is determined by the use of the class or kind of articles to which the imported merchandise belongs. As such, they are considered provisions controlled by Additional U.S. Rule of Interpretation 1(a), HTSUS.

Customs current position regarding subheading 7010.90.50, HTSUS, is in accord with the findings of the CIT in *Group Italglass U.S.A. v. United States*, USITR, 17 CIT ___, Slip Op. 93-46 (Mar. 29, 1993). *Italglass* held that the language of heading 7010, HTSUS, implicates use as a criterion of classification for that entire heading, which includes subheading 7010.90.50, HTSUS, and that principal use was the controlling use. Additionally, the court held that the phrase "of the kind" preceding the words "used for" did not constitute a special language or context. See Sturm, Ruth, *Customs Law and Administration*, vol. 2., sec. 53.3, p. 28.

Customs proposes no changes in this regard. Subheadings 7010.90.50 and 7013.39, HTSUS, would remain principal use provisions. Therefore, for an imported good to be classifiable in either of these subheadings, it must be of the class or kind of articles classifiable in these subheadings. Whether it is of the class or kind of articles classifiable in either subheading will be determined by its principal use. Principal use will, in turn, be determined by the specific criteria formulated to determine to what class or kind the imported goods belong.

Based on the plain language of the provision, Customs is of the opinion that subheading 7010.90.50, HTSUS, includes the classes "glass containers of a kind used for the conveyance or packing of goods" and "preserving jars of glass".

CONTAINERS OF A KIND USED FOR THE CONVEYANCE OR PACKING OF GOODS

Customs understanding of the principal use of this class and the factors which indicate acceptance of a particular article in the class, is based on the Harmonized Commodity Description and Coding System

Explanatory Notes (ENs), relevant Headquarters Rulings Letters (HRLs) and the Kraft case.

In understanding the language of the HTSUS, Customs consults the ENs. The ENs, although not dispositive, provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes that they should be consulted for guidance in determining the proper interpretation of the HTSUS. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 70.10, pg. 933-934, states, in pertinent part, that:

This heading covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.). They include:

(A) Carboys, demijohns, bottles (including syphon vases), phials and similar containers, of all shapes and sizes, used as containers for chemical products (acids, etc.) beverages, oils, meat extracts, perfumery preparations, pharmaceutical products, inks, glues, etc.

These articles, formerly produced by blowing, are now almost invariably manufactured by machines which automatically feed molten glass into moulds where the finished articles are formed by the action of compressed air. They are usually made of ordinary glass (colourless or coloured) although some bottles (e.g., for perfumes) may be made of lead crystal, and certain large carboys are made of fused quartz or other fused silica
* * *

These containers remain in this heading even if they are ground, cut, sand-blasted, etched or engraved, or decorated (this applies, in particular, to certain perfume or liqueur bottles), banded, wickered or otherwise trimmed with various materials (wicker, straw, raffia, metal, etc.); they may also have tumbler-caps fitted to the neck. They may be fitted with drop measuring devices or may be graduated, provided that they are not of a kind used as laboratory glassware.

(B) Jars, pots and similar containers for the conveyance or packing of certain foodstuffs * * *, pharmaceutical products, * * * polishes, cleaning preparations, etc.

These articles are usually made of ordinary glass (colourless or tinted) by pressure in a mould usually followed by blowing with compressed air. They generally have a large opening, a short neck (if any) and as a rule, a lip or flange to hold the lid or cap. Some of these containers, however may be closed by corks or screwstoppers.

In HRL 087359, dated August 8, 1990, Customs explained the phrase "commercially used to convey", as used in the ENs, when referring to the class of glass containers commercially used to convey solid or liquid products. The ruling stated, in pertinent part, that:

the key phrase in this instance is "commonly used commercially for the conveyance" of liquids. The root word of "commercially" is commerce which is described as the exchange or buying and selling of commodities. *Webster's Third New International Dictionary*, (1986)

and *The Random House Dictionary of the English Language*, (1983). The root word of "conveyance" is convey which is described as to carry, bring or take from one place to another; transport; bear. *The Random House Dictionary of the English Language*, (1983) and *Webster's Third New International Dictionary*, (1986).

Based on this ruling, Customs current position is that the principal use for the class "containers used for the conveyance or packing of goods" is that glass articles of this class be part of the exchange or buying and selling of commodities, and be used to convey or pack a product to a consumer who then uses the product and discards the container.

After reviewing the *Kraft* case, the ENs and the relevant HRLs, Customs believes that together, they provide specific identifiable characteristics which are indicative, but not conclusive of whether a particular glass article qualifies as part of the class "containers of glass of a kind used for the conveyance or packing of goods". These characteristics would include, containers, of all shapes and sizes:

1. generally having a large opening, a short neck (if any) and as a rule, a lip or flange to hold the lid or cap, made of ordinary glass (colourless or coloured) and manufactured by machines which automatically feed molten glass into moulds where the finished articles are formed by the action of compressed air;
2. in which the ultimate purchaser's primary expectation is to discard the container after the conveyed or packed goods are used;
3. sold from the importer to a wholesaler/distributor who then packs them with goods;
4. sold in an environment of sale that features the goods packed in the jar and not the jar itself;
5. used to commercially convey foodstuffs, beverages, oils, meat extracts, etc.;
6. capable of being used in the hot packing process; and
7. recognized in the trade as used primarily to pack and convey goods to a consumer who then discards the container after this initial use.

Customs current position is that the physical characteristics of a particular glass article are the primary indicator of whether it belongs to the class "containers of a kind used for the packing or conveyance of goods".

Kraft discussed a container's ability to be used in the "hot packing" process as a possible indicator that a particular container was of a kind used for the packing or conveyance of goods. However, it is Customs understanding that most glassware is capable of being used in the "hot packing" process. Therefore, whether a particular container is capable of being used in the "hot packing" process, is of limited utility when determining whether it is classifiable as a container of a kind used for the packing or conveyance of goods.

Customs proposes to continue to apply the standards outlined above with one addition. The proposed addition involves glass containers imported *without* their corresponding caps or lids. Based on observa-

tions of importations, Customs proposed position is that "glass containers imported without their corresponding caps or lids" is an additional physical characteristic that indicates that particular containers will be used for the conveyance or packing of goods.

We realize that subheading 7010.90.50, HTSUS, provides for containers imported with or without their lids. However, Customs proposed position is that whether containers are, or are not, imported with lids is a distinct indication of their use.

PRESERVING JARS OF GLASS

Customs present position regarding the class "preserving jars of glass" is that it provides for various articles which are the typical size and shape of "Mason-type" jars. Whether a particular glass jar is a preserving jar is presently determined on a case-by-case basis. Customs does, however, consider volumes of between .23 liters and 2.2 liters and a shape and height of a typical Mason jar (e.g., not multi-sided) to be indicative, but not conclusive, physical characteristics of a preserving jar.

This understanding is based on relevant HRLs and the ENs. In HRL 087727, dated September 21, 1990, Customs ruled that the class "preserving jars of glass is limited to merchandise in the sizes and shapes of typical 'Mason-type' preserving jars which hold the volumes typical of preserve jars (i.e., one half pint to one half gallon)." Additionally, EN 70.10 pg. 933-934, states, in pertinent part, that "[t]he heading also includes preserving jars of glass".

Preserving jars are not defined in the heading or ENs. A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. *Nippon Kogasku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982). The term "preserving" is described, in pertinent part, as "[t]o prepare food for future use, as by canning or salting; to treat fruit or other foods so as to prevent decay". *Webster's II New Riverside University Dictionary*, (1984).

Based upon the above definition, the U.S. Department of Agriculture, Extension Service, Complete Guide to Home Canning: Guide 1 Principles of Home Canning (Agricultural Information Bulletin No. 539-1, May 1989), and consultation with members of the home canning trade, Customs proposed position is that the principal use for the class "preserving jars of glass" is jars purchased and used for home canning only. Further, Customs understands that there are identifiable characteristics that are indicative, but not conclusive of the principal use of glass jars classifiable as "preserving jars of glass". These would include:

glass articles of any shape that are between .23 and 2.2 liter sizes, and are regular and wide-mouth "Mason-type", threaded, home-canning jars with self-sealing lids.

Generally, the standard jar mouth opening is about 2 3/4 inches with wide mouth jars having 3 inch openings. "Mason-type" jars have narrower sealing surfaces and are tempered less than most commercial pint and quart-size jars. The common self-sealing lid consists of a flat metal lid held in place by a metal screw band during processing. The flat lid is crimped around its bottom edge to form a trough, which is filled with a colored gasket compound. These physical criteria are based on Customs understanding of the U.S. Department of Agriculture, Extension Service, Complete Guide to Home Canning: Guide 1 Principles of Home Canning (Agricultural Information Bulletin No. 539-1, May 1989), pgs. 14-15 and discussion with members of the trade.

Additionally, on page 11 of the above mentioned bulletin, under the subtitle "Equipment and methods not recommended", this publication indicates that jars with wire bails and glass caps and one-piece zinc porcelain lined caps are not recommended for home canning. We note that these "non Mason-type" jars are often advertised and sold in sets of varying sizes for use in the storage of goods in the home. Thus, it is Customs proposed position that they are classifiable under subheading 7013.39, HTSUS.

Under Customs proposed position, the only type of glass article classifiable as part of the class or kind "preserving jars of glass", would be regular and wide-mouth "Mason-type", threaded, home-canning jars with self-sealing lids. Glass articles with wire bails and glass or porcelain caps or lids would not be classifiable as "preserving jars of glass" as their physical characteristics do not allow them to be recommended for home canning use.

GLASSWARE OF A KIND USED FOR TABLE OR KITCHEN PURPOSES:
GLASS STORAGE ARTICLES

Based on the plain language of the heading, Customs is of the opinion that subheading 7013.39, HTSUS, provides for the class "glassware of a kind used for table or kitchen purposes".

Customs position is based on exemplars from EN 70.13, which we believe demonstrate that the class "glassware of a kind used for table or kitchen purposes" provides for certain glass articles principally used for household storage. EN 70.13, pg. 936-937, states, in pertinent part, that:

[t]his heading covers the following types of articles, most of which are obtained by pressing or blowing in moulds:

(1) [t]able or kitchen glassware, e.g., drinking glasses, goblets, tankards, decanters, infants' feeding bottles, pitchers, jugs, plates, salad bowls, sugar-bowls, sauce-boats, fruit-stands, cake-stands, hors-d'oeuvres dishes, bowls, basins, egg-cups, butter dishes, oil or vinegar cruets, dishes (for serving, cooking, etc.) stew-pans, casseroles, trays, salt cellars, sugar sifters, knife-rests, mixers, table hand bells, coffee-pots and coffee-filters, sweetmeat boxes, graduated kitchenware, plate warmers, table mats, certain parts of

domestic churns, cups for coffee-mills, cheese dishes, lemon squeezers, ice-buckets * * *

Customs understands that the exemplars listed are articles principally used to hold or store other articles in the home. We believe that among these articles, certain glass storage jars may also be principally used in this fashion. Therefore, glass articles which are principally used to store articles in the home are classifiable under subheading 7013.39, HTSUS.

After reviewing the ENs, relevant HRL's, and applying the principal use factors, which are indicative but not conclusive, for determining whether merchandise falls within a particular class or kind, Customs has identified the following characteristics which we believe are indicative, but not conclusive of glassware of a kind used for table or kitchen purposes; glass household storage articles. They are glass articles:

1. made of ordinary glass, lead crystal glass, glass having a low coefficient of expansion (e.g., borosilicate glass) or of glass ceramics (the latter two in particular, for kitchen glassware). They may also be colourless, coloured or of flashed glass, and may be cut, frosted, etched or engraved;
2. having a decorative motif consistent with a kitchen decor (e.g., geese, "country theme", etc.);
3. which the consumer purchases primarily to use for storage in the home;
4. sold from the importer to a wholesaler/distributor who then sells them to a retailer;
5. sold in an environment of sale that emphasizes the article's use or reuse as a storage article;
6. sold to the ultimate purchaser empty;
7. which are recognized in the trade as primarily having a household storage use; and
8. which are imported with their caps or lids.

This understanding is based on the above cited EN and relevant HRLs. HRL 953282, dated February 16, 1993, classified a 1 liter glass jar decorated with a blue ribbon and decalmania which created a country motif band in blue, pink, green and yellow around the middle of the jar. Customs held that, while the container did convey goods, its decoration, lid, and environment of sale all indicated that the principal use of the container was for storage, not the conveyance of goods. See also, HRL 087727, dated September 21, 1990, which classified spice jars as household storage jars.

Customs proposes to continue to apply the standards outlined above. We note that due to the USDA report's recommendation that glass articles with wire bale and trigger closures (non "Mason-type") not be used for home canning, but rather as storage articles for dry ingredients, all glass articles with wire bale trigger closures and glass caps or lids will be classifiable under subheading 7013.39, HTSUS.

However, we note that there are glass articles capable of both conveyance or packing of goods and household storage, as demonstrated in the

Kraft case. Instances of these types of articles will be reviewed on a case-by-case basis, with the above outlined characteristics determining the article's principal use and classification.

AUTHORITY

This notice is published in accordance with section 177.10(c), Customs Regulations (19 CFR 177.10(c)).

COMMENTS

In accordance with the above discussion, Customs is now seeking comments from the public regarding the proposed change of practice with regards to the tariff provisions for all three of these classes of glass articles. Customs is especially interested in receiving comments regarding the characteristics that are indicative of each class.

Before adopting this proposed change in practice, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11 (b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington DC.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: September 23, 1994.

JOHN W. MANGELS.

Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 12, 1994 (59 FR 51659)]

**QUARTERLY IRS INTEREST RATES USED IN CALCULATING
INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON
CUSTOMS DUTIES**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of an increase in the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning October 1, 1994, the rates will be 8 percent for overpayments and 9 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 1994.

FOR FURTHER INFORMATION CONTACT: John V. Accetturo, U.S. Customs Service, National Finance Center, Revenue Accounting Branch, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298-1308.

SUPPLEMENTARY INFORMATION:

BACKGROUND

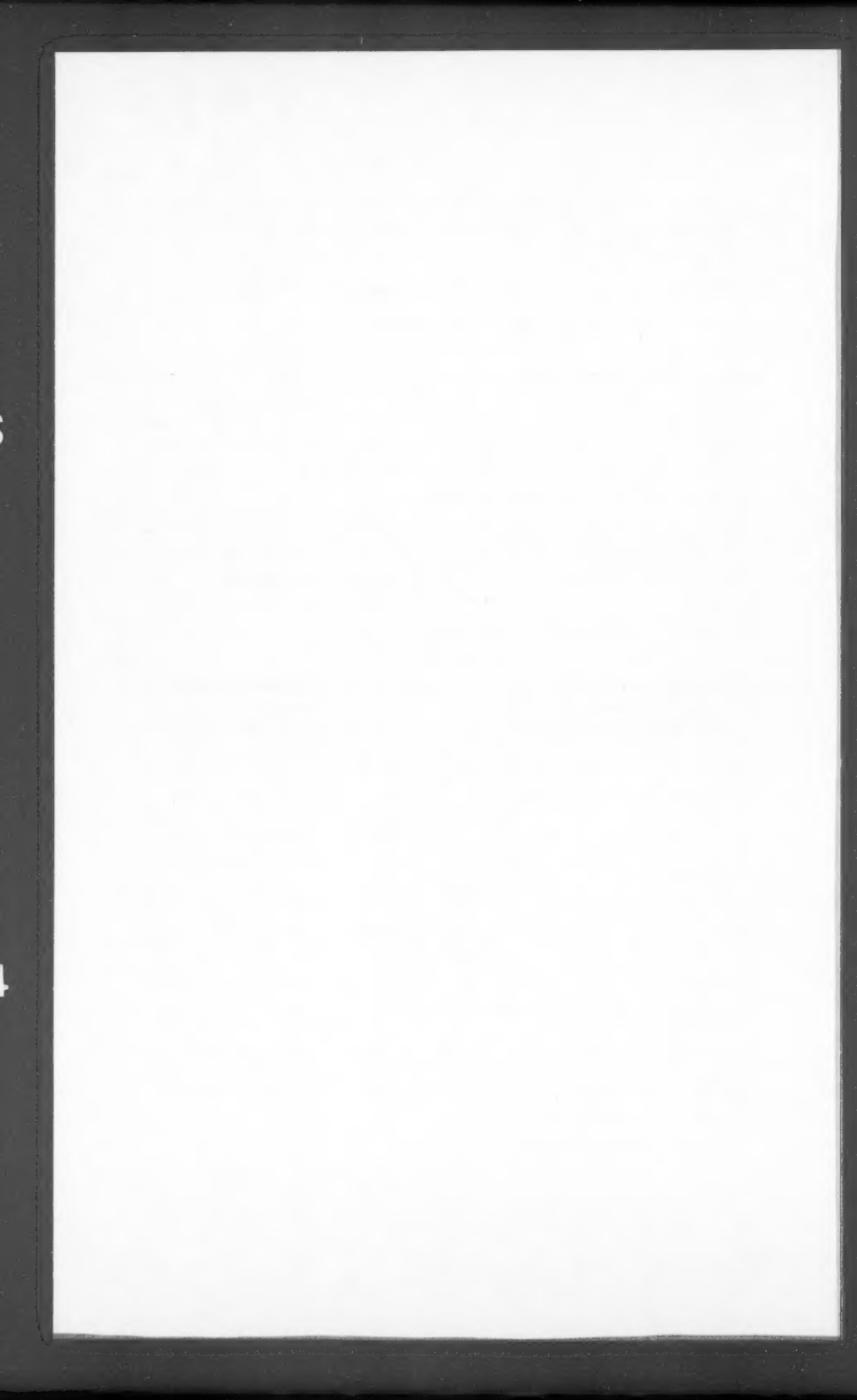
Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first month period of the previous quarter. The rates of interest for the first quarter of fiscal year (FY) 1995 (the period of October 1—December 31, 1994) are increased to 8 percent for overpayments and 9 percent for underpayments. These rates will remain in effect through December 31, 1994, and are subject to change for the second quarter of FY-1995 (the period of January 1—March 31, 1995).

Dated: October 11, 1994.

GEORGE J. WEISE,
Commissioner of Customs.

[Published in the Federal Register, October 17, 1994 (59 FR 52362)]



United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94-155)

MITSUBISHI ELECTRONICS AMERICA, INC., PLAINTIFF v.
UNITED STATES, DEFENDANT

Consolidated Court No. 92-03-00190

[Plaintiff's motion to strike defendant's affirmative defense and for partial summary judgment is denied. Defendant's cross-motion for partial summary judgment is granted.]

(Dated October 3, 1994)

Baker & McKenzie (Thomas P. Ondeck and Kevin M. O'Brien), for plaintiff.

Frank W. Hunger, Assistant Attorney General; Joseph I. Liebman, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Bruce N. Stratvert) Office of Assistant Chief Counsel, United States Customs Service (Laura R. Siegel), of counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge*: This consolidated matter is before the Court on plaintiff's motion to strike defendant's affirmative defense and for partial summary judgment. Defendant opposes plaintiff's motion and brings a cross-motion for partial summary judgment.

BACKGROUND

By motion and cross-motion, the parties ask the Court to determine whether it has jurisdiction to hear the case at bar. The case involves the classification, for customs purposes, of optoelectronic semiconductor laser diode modules used in fiber optics communications. The parties have stipulated to the material facts which follow.

Plaintiff is the importer of the merchandise. The United States Customs Service ("Customs") initially liquidated the merchandise under subheading 8517.81.00, Harmonized Tariff Schedule of the United States ("HTS") as "other apparatus: telephonic," with a duty rate of 8.5% *ad valorem*.

Plaintiff timely filed ten protests with Customs challenging Customs' liquidation of the merchandise under subheading 8517.81.00, HTS. Plaintiff claimed that Customs should have classified the merchandise under either: (1) subheading 8541.10.00, HTS as "diodes, other than photosensitive or light-emitting diodes: other;" or (2) subheading 8541.40.60, HTS as "photosensitive semiconductor devices: other

diodes." Both of the categories advanced by plaintiff call for duty-free entry.

Customs did not find that the merchandise fit under either the categories advanced by plaintiff, or the category under which the merchandise had been liquidated originally. Instead, Customs found that it should classify the merchandise in an altogether different category with a duty rate of 4.2% *ad valorem*. Consequently, Customs issued notices to plaintiff, informing it that its protests had been "denied * * * in part," and reliquidated most of the merchandise.

Customs reliquidated most of the merchandise under subheading 8541.40.95, HTS, as "photosensitive semiconductor devices: other: other," with a duty rate of 4.2% *ad valorem*. More particularly, Customs reliquidated all entries under Protest Nos. 28090-000505, 28090-000638, 280990-102093, 28099-001002, 280990-101988, 280991-100296, 280991-100317, and 280991-100805. Customs also reliquidated all entries under Protest No. 280991-101339, except for Entry No. 442-0326493-0. Customs failed to reliquidate any entries under Protest No. 280990-101231. Customs' failure to reliquidate all of the entries under all ten of plaintiff's protests at a duty rate of 4.2% *ad valorem* was inadvertent.

Plaintiff paid all duties on the entries, without filing protests against the reliquidation of certain entries under subheading 8541.40.95, HTS. Then, more than ninety days after the reliquidation, plaintiff filed two cases in this Court, numbers 92-03-00190 and 92-03-00191, contesting the reliquidation of its merchandise.¹ Plaintiff claims that the merchandise should be classified under either: (1) subheading 8541.10.00, HTS (free); (2) subheading 8541.40.60, HTS (free); or (3) subheading 8541.40.20, HTS, "photosensitive Semiconductor devices: light emitting diodes" (2% *ad valorem*).

Since plaintiff filed suit in this Court, the Headquarters Office of the Customs Service issued a ruling in response to a Request for Further Review concerning the classification of "Toshiba Laser Diodes," items which are substantially similar to plaintiff's merchandise. Headquarters Ruling Letter No. 088754 (June 2, 1992). The Headquarters Office classified "Toshiba Laser Diodes" under subheading 854.40.20, HTS with a duty rate of 2% *ad valorem*. Customs now admits that those entries of plaintiff's merchandise which it neglected to reliquidate are classifiable under subheading 854.40.20, HTS with a duty rate of 2% *ad valorem*. As for those entries which it did reliquidate, however, Customs asserts that the Court lacks jurisdiction to entertain plaintiff's actions.

To settle the question of the Court's jurisdiction, plaintiff moves: (1) to strike Customs' affirmative defense regarding lack of jurisdiction; and (2) for partial summary judgment in each of the two cases which it has filed. Customs opposes plaintiff's motion, and cross-moves for par-

¹ Court No. 92-03-00190 covers Protest Nos. 28090-000505, 28090-000638, 280990-102093, and 280990-101231. Court No. 92-03-00191 covers Protest Nos. 28099-001002, 280990-101988, 280991-100296, 280991-100317, 280991-100805, and 280991-101339.

tial summary judgment in each case. Subsequent to the filing of the motions in each action, the Court consolidated these two cases under case number 92-03-00190. The Court therefore addresses the parties' motions and cross-motions in the context of this consolidated action.

DISCUSSION

When a defendant challenges the Court's jurisdiction, the plaintiff has the burden of demonstrating that jurisdiction exists. *Lowa, Ltd. v. United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984).

A. Failure To Protest Reliquidation:

Plaintiff argues that the Court has jurisdiction over all entries of its merchandise pursuant to 28 U.S.C. § 1581(a), which provides the Court with jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part." More specifically, plaintiff claims that the Court has jurisdiction because plaintiff timely filed suit after Customs ostensibly "denied * * * in part" plaintiff's protests of the initial liquidation of the entries. Plaintiff contends that it did not need to protest the subsequently reliquidated entries in order for the Court to have jurisdiction over those entries.

Plaintiff fails to recognize, however, that "[r]eliquidation vacates and is substituted for the collector's original liquidation. The reliquidation, not the original liquidation, is the final decision of the collector as to the rate and amount of duty to be paid by the importer, and the time to protest begins to run from the date of the latest liquidation." *United States v. Parkhurst & Co.*, 12 Ct. Cust. App. 370, 373 (1924). If the importer fails to file a protest of a reliquidation with Customs within ninety days of the reliquidation, the reliquidation becomes final. 19 U.S.C. § 1514(a); 19 U.S.C. § 1514(c)(2)(A). Consequently, protest of a reliquidation with Customs generally serves as a prerequisite to seeking judicial review of the reliquidation. *Transflock, Inc. v. United States*, 15 CIT 248, 249, 765 F. Supp. 750, 751 (1991). Because plaintiff failed to file protests against the reliquidated entries within 90 days, the Court does not have jurisdiction over the reliquidated entries in this case.

B. Entries Reliquidated More Than 90 Days After Liquidation:

Plaintiff also argues that Customs reliquidated the entries more than 90 days after the notice of liquidation, in violation of 19 U.S.C. § 1501. Plaintiff therefore asserts that the Court should disregard the illegal reliquidation of the merchandise and recognize the initial liquidation of the merchandise as the final protestable action by Customs.

An untimely or otherwise illegal reliquidation by Customs is not void; it is only voidable. *See e.g., Omni U.S.A., Inc. v. United States*, 6 Fed. Cir. (T) 99, 103, 840 F.2d 912, 915 (1988); *United States v. A.N. Deringer*, 66 CCPA 54, 55, 593 F.2d 1015, 1020 (1978). An importer must raise a contention of illegality by filing a timely protest against the reliquidation; otherwise, the reliquidation will become final and conclusive. 19 U.S.C. § 1514(a)(5); *Commonwealth Oil Refining Co. v. United*

States, 67 Cust. Ct. 155, 163, 332 F. Supp. 203, 209 (1971). Because plaintiff did not protest the legality of the reliquidation within 90 days of the reliquidation, it has become final and conclusive, regardless of its timeliness. The Court will not disregard it.

C. Equitable Principles:

Plaintiff further argues that principles of equity require the Court to exercise jurisdiction over the reliquidated entries.

Plaintiff fails to acknowledge, however, that "[t]he terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain suit." *NEC Corp. v. United States*, 5 Fed. Cir. (T) 49, 51, 806 F.2d 247, 249 (1986). In a case against the government, jurisdictional statutory requirements cannot be waived or subjected to excuse or remedy based upon equitable principles. *Id.* Equitable estoppel, for example, is usually not available in cases against the government involving the collection or refund of duties on imports. *United States v. Reliable Chemical Co.*, 66 CCPA 123, 128, 605 F.2d 1179, 1184 (1979). Consequently, equitable principles do not operate to allow the Court to exercise jurisdiction over the reliquidated entries in this case.

D. Administrative Principles:

Finally, plaintiff argues that principles of administrative law excused it from having to file a protest against the reliquidation before seeking judicial review. Plaintiff essentially claims that it was not statutorily required to protest the reliquidation and that it would have been futile for plaintiff to do so.

As discussed above, an importer is statutorily required to file a valid protest against a reliquidation as a prerequisite to review by this Court. Although the importer cannot use reliquidation as an excuse for raising protests which it failed to assert after the initial liquidation, the importer can protest the accuracy of corrections made via reliquidation. *Computime, Inc. v. United States*, 3 Fed. Cir. (T) 175, 178, 772 F.2d 874, 877 (1985). The protest informs Customs that corrections effected by a reliquidation have not appeased the importer and explains why the importer finds particular corrections unsatisfactory. 19 U.S.C. § 1514(c)(1). By filing the protest, the importer asks Customs to reconsider the accuracy of modifications embodied in a reliquidation and to issue a final view, thereby exhausting the importer's administrative remedies. Because the statutorily required protest of a reliquidation serves these purposes, plaintiff cannot successfully argue that the futility exception to exhaustion of administrative remedies applies in this case. For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to strike defendant's affirmative defense and for partial summary judgment is DENIED; it is further

ORDERED that defendant's cross-motion for partial summary judgment is GRANTED; it is further

ORDERED that Protest Nos. 28090-000505; 28090-000638; 280990-102093; 28099-001002; 280990-101988; 280991-100296; 280991-100317; and 280991-100805; as well as all entries under Pro-

test No. 280991-101339 other than Entry No. 442-0326493-0, are hereby severed from this consolidated action and designated Court No. 92-03-00190-S, which action is hereby dismissed for lack of jurisdiction; and it is further

ORDERED that the parties shall, within twenty-one (21) days of the date of this Memorandum and Order, submit to the Court a joint proposed scheduling order which will govern all subsequent proceedings in this consolidated action.

(Slip Op. 94-156)

INDUSTRIA DE FUNDICAO TUPY AND AMERICAN IRON & ALLOYS CORP.,
PLAINTIFFS v. RONALD BROWN, SECRETARY OF COMMERCE, U.S.
DEPARTMENT OF COMMERCE, AND UNITED STATES, DEFENDANTS, AND
GRINNELL CORP. WARD MANUFACTURING, INC., AND STOCKHAM VALVES &
FITTINGS CO., INC., DEFENDANT-INTERVENORS

Court No. 94-09-00528

Industria de Fundicao Tupy and American Iron & Alloys Corporation move, pursuant to Rule 65 (a) of the Rules of this Court, for a preliminary injunction to enjoin the United States Department of Commerce, International Trade Administration ("Commerce"), from conducting an administrative review with respect to *Antidumping Duty Order: Malleable Cast Iron Pine Fittings From Brazil*, 51 Fed. Reg. 18,640 (1986) (the "Order"). Plaintiffs request this relief pending resolution on the merits of plaintiffs' civil action which challenges Commerce's right to conduct an administrative review of the Order for the period May 1, 1993 through April 30, 1994.

Held: Plaintiffs' motion for a preliminary injunction is denied. The temporary restraining order issued by this court on September 9, 1994 for the interim until the Court could hear arguments with respect to the instant controversy and determine whether a preliminary injunction should issue is hereby dissolved.

[Plaintiffs' motion for a preliminary injunction is denied; the underlying temporary restraining order is dissolved.]

(Dated October 6, 1994)

Sonnenberg, Anderson & Rodriguez (Philip Yale Simons; of counsel: Jerry P. Wiskin, Steven P. Sonnenberg and Jacqueline M. Paez) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (A. David Lafer, Senior Trial Counsel, and Hal S. Shapiro); of counsel: Michelle K. Behaylo, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

McKenna & Cuneo, (Peter Buck Feller and Lawrence J. Bogard) for defendant-intervenors.

OPINION

TSOUCALAS, *Judge:* Plaintiffs in this case are Industria de Fundicao Tupy and American Iron & Alloys Corporation (collectively "Tupy"). Industria de Fundicao Tupy is a Brazilian corporation which manufac-

tures malleable cast iron pipe fittings and exports them to the United States through its wholly-owned U.S.-based subsidiary, American Iron & Alloys Corporation. Pursuant to Rule 65 of the Rules of the Court, on September 9, 1994, Tupy applied for a temporary restraining order ("TRO") and a preliminary injunction to enjoin the Department of Commerce, International Trade Administration ("Commerce"), from conducting an administrative review with respect to *Antidumping Duty Order: Malleable Cast Iron Pipe Fittings From Brazil*, 51 Fed. Reg. 18,640 (1986) (the "Order"). Plaintiffs seek this relief during the pendency of their civil action which challenges Commerce's right to conduct an administrative review of the Order for the period May 1, 1993 through April 30, 1994.

On September 9, 1994, Judge Richard W. Goldberg of this court granted plaintiffs' application for a TRO and scheduled a full hearing for September 13, 1994 with respect to plaintiffs' request for a preliminary injunction. This hearing was rescheduled for September 28, 1994, at which time the Court received oral argument in order to determine whether preliminary injunctive relief would be appropriate.

BACKGROUND

On March 31, 1986, Commerce determined that Tupy's¹ malleable cast iron pipe fittings from Brazil were being, or were likely to be, sold in the United States at less than fair value. *Antidumping; Malleable Cast Iron Pipe Fittings, Other Than Grooved, From Brazil; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 10,897 (1986). Subsequently the International Trade Commission found that imports of Tupy's malleable iron pipe fittings were causing material injury to the U.S. industry which produced the like product. *Certain Cast-Iron Pipe Fittings From Brazil, Korea, and Taiwan*, 51 Fed. Reg. 18,670 (1986). On May 21, 1986, Commerce issued the antidumping duty order with respect to imports of malleable iron pipe fittings from Brazil. 51 Fed. Reg. 18,640.

Commerce did not conduct administrative reviews of the Order in 1987 and 1988.

On May 3, 1989, during the third annual anniversary month² of the Order, Commerce solicited requests for an administrative review of the Order. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 54 Fed. Reg. 18,918 (1989). The domestic industry did not request an administrative review.

On May 8, 1990, during the fourth annual anniversary month of the Order, Commerce again solicited requests for administrative review. *Antidumping or Countervailing Duty Order, Finding, or Suspended*

¹ During the time of the original investigation, Tupy was known as Fundicao Tupy, S.A.

² The term, "anniversary month," refers to the anniversary month of the publication of an antidumping duty order, i.e., "the calendar month in which the anniversary of the date of publication of the order or finding occurs." 19 C.F.R. § 353.22(a) (1991). The anniversary month in the instant case is May.

Investigation; Opportunity to Request Administrative Review, 55 Fed. Reg. 19,093 (1990). Again, no requests for a review ensued.

On May 2, 1991, during the fifth annual anniversary month of the Order, Commerce published a notice of intent to revoke the Order. *Malleable Cast-Iron Pipe Fittings From Brazil, Intent to Revoke Antidumping Order*, 56 Fed. Reg. 20,193 (1991). On May 30, 1991, the Cast Iron Pipe Fittings Committee, the petitioner in the original investigation, objected to the proposed revocation. Consequently, on June 26, 1991, Commerce determined not to revoke the Order. *Malleable Cast Iron Pipe Fittings From Brazil; Determination Not to Revoke Antidumping Duty Order*, 56 Fed. Reg. 29,220 (1991). Plaintiffs did not appeal Commerce's determination.

In 1992, "[d]ue to an administrative oversight," Commerce inadvertently failed to publish any notice of intent to revoke the Order. *Defendants' Memorandum in Opposition to Plaintiffs' Application for a Preliminary Injunction ("Defendants' Brief")* at 4. The domestic industry did not request an administrative review or question Commerce's failure to publish a notice of intent to revoke. Plaintiffs did not object to Commerce's failure to revoke the Order.

In May 1993, Commerce failed to publish a notice of intent to revoke; it published the notice on June 21, 1993. *Malleable Cast Iron Pipe Fittings From Brazil; Intent to Revoke Antidumping Duty Order*, 58 Fed. Reg. 33,796 (1993). On July 21, 1993, Grinnell Corporation ("Grinnell"), Stockham Valves & Fittings Co., Inc. ("Stockham"), Stanley G. Flagg & Company, Inc., and Ward Manufacturing, Inc. ("Ward") objected to the proposed revocation. Consequently, on September 30, 1993, Commerce published a notice of determination not to revoke the Order. *Malleable Cast Iron Pipe Fittings From Brazil; Determination Not to Revoke Antidumping Duty Order ("Determination Not to Revoke Order")*, 58 Fed. Reg. 51,057 (1993). Plaintiffs did not appeal Commerce's determination.

In 1994, on May 3rd, Commerce published a notice communicating an intent to revoke the Order if interested parties did not request an administrative review or object to the proposed revocation by May 31, 1994. *Intent to Revoke Antidumping Duty Orders and Findings*, 59 Fed. Reg. 22,821 (1994). The following day, on May 4th, Grinnell, Ward and Stockham requested an administrative review pursuant to 19 U.S.C. § 1675(a) (1988). *Defendants' Brief* at 5. On July 15, 1994, indicating that it had inadvertently omitted listing the Order in its previous initiation notice, Commerce listed the Order among various antidumping duty orders and findings with June anniversary dates for which timely requests for administrative reviews had been made. By such notice, Commerce announced initiation of an administrative review of the Order for the period May 1, 1993 through April 30, 1994. *Initiation of Antidumping Duty Administrative Reviews and Requests for Revocation in Part*, 59 Fed. Reg. 36,160 (1994).

On July 22, 1994, for the purpose of conducting an administrative review of the Order, Commerce issued a questionnaire to Industria de Fundicao Tupy. The response date was September 20, 1994, day 60 of the annual review.

By letter dated August 8, 1994, Industria de Fundicao Tupy requested that Commerce immediately revoke the finding of dumping against malleable cast iron pipe fittings from Brazil. It based its request on the Court's decision in *Kemira Fibres Oy v. United States* ("*Kemira I*"), 18 CIT ___, Slip Op. 94-120 (July 26, 1994).

Defendant-intervenors Grinnell, Ward and Stockham, domestic manufacturers of malleable iron pipe fittings, oppose plaintiffs' motion for injunctive relief. These interested parties were members of the industry group that petitioned for the investigation which resulted in issuance of the Order. *Defendant-Intervenors' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction* ("*Defendant-Intervenors' Brief*") at 2.

DISCUSSION

In order for a preliminary injunction to issue, plaintiffs must demonstrate: (1) that it has a likelihood of success on the merits; (2) that there is a threat of immediate and irreparable harm to plaintiffs if relief is not granted; (3) that the balance of hardships to the parties favors issuance of the preliminary injunction; and (4) that the public interest would be better served by a grant of the relief requested. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *Timken Co. v. United States*, 11 CIT 504, 506, 666 F. Supp. 1558, 1559 (1987). "If any one of the requisite factors has not been established by plaintiffs, the motion for a preliminary injunction must be denied." *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 587, 588, 744 F. Supp. 1177, 1179 (1990), citing *S.J. Stile Assocs. Ltd. v. Snyder*, 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *Budd Co., Wheel and Brake Div. v. United States*, 12 CIT 1020, 1022, 700 F. Supp. 35, 37 (1988).

Plaintiffs' Likelihood of Success on the Merits:

Before the Court is the Commerce companion regulation to the anti-dumping laws, 19 C.F.R. § 353.25(d)(4).³

Plaintiffs make two distinct arguments based on § 353.25(d)(4) to support their contention that, as a matter of law, Commerce is barred from proceeding with an administrative review of the Order for the

³ § 353.25 Revocation of orders; termination of suspended investigation.

(d) Revocation or termination based on changed circumstances * * *

(4)(i) If for four consecutive annual anniversary months no interested party has requested an administrative review under § 353.22(a), of an order or suspended investigation, not later than the first day of the fifth consecutive annual anniversary month, the Secretary will publish in the Federal Register notice of "Intent to Revoke Order" or, if appropriate, "Intent to Terminate Suspended Investigation."

(ii) Not later than the date of publication of the notice described in paragraph (d)(4)(i) of this section, the Secretary will serve written notice of the intent to revoke or terminate on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the like product.

(iii) If by the last day of the fifth annual anniversary month no interested party objects, or requests an administrative review under § 353.22(a), the Secretary at that time will conclude that the requirements of paragraph (d)(1)(i) for revocation or termination are met, revoke the order or terminate the suspended investigation, and publish in the Federal Register the notice described in paragraph (d)(3)(vii) of this section.

19 C.F.R. § 353.25(d)(4) (1991) (emphasis added).

period May 1, 1993 through April 30, 1994. First, plaintiffs argue that an administrative review would be illegal in light of Commerce's "repeated violation of Section 353.25(d)(4)(i)." *Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction* ("Plaintiffs' Brief") at 8. Second, plaintiffs argue that an administration review would be unlawful as Commerce is obligated to revoke the outstanding Order pursuant to § 353.25(d)(4)(iii). *Id.* at 10-15.

Specifically, plaintiffs assert that with regard to 1991, instead of publishing a notice of intent to revoke the Order on May 1st as is required by § 353.25(d)(4)(i), Commerce published the notice "a day late in contravention of its regulations" and an interested party responded with an objection on May 30th. *Id.* at 11.

With regard to 1992, plaintiffs claim that Commerce failed to publish a notice of intent to revoke "at any time during the entire calendar year of 1992," thereby contravening § 353.25(d)(4)(i). *Id.* Further, plaintiffs submit that, as the domestic industry failed to request an administrative review or file an objection to revocation, Commerce was obligated to revoke the Order on June 1, 1992 pursuant to § 353.25(d)(4)(iii). *Id.* at 11-12.

With regard to 1993, plaintiffs claim that Commerce's June 21st notice of intent to revoke was invalid because it was published "[s]even weeks after the time provided by its regulation" and the interested parties' July 21st objection to the proposed revocation was likewise invalid. *Id.* at 4. Therefore, Commerce was obligated to revoke the Order on June 1, 1993. *Id.* at 12-13.

With regard to 1994, plaintiffs claim that Commerce's May 3rd notice of intent to revoke was invalid as § 353.25(d)(4)(i) requires a May 1st publication date. *Id.* at 5. Plaintiffs concede that, on May 4th, three interested parties requested an administrative review of the Order. *Id.* However, plaintiffs submit that the Order should have been "revoked over two years earlier." *Id.* at 13.

Plaintiffs contend that, in failing to comply with its regulation and in not revoking the Order, Commerce has acted arbitrarily and capriciously, violating plaintiffs' procedural due process rights. *Id.*

In its opposition to plaintiffs' motion, Commerce essentially makes the arguments that it made in *Kemira I*, 18 CIT at ___, Slip Op. 94-120, and in *Kemira Fibres Oy v. United States*, 18 CIT ___, Slip Op. 94-139 (September 8, 1994) ("*Kemira II*"). In addition, Commerce maintains that plaintiffs' claim is barred by the doctrine of laches. *Defendants' Brief* at 12-16.

In *Kemira I*, the Court relied on § 353.25(d)(4) to grant *Kemira Fibres Oy* ("*Kemira*") a preliminary injunction enjoining Commerce from conducting an administrative review of an antidumping duty order (also the "Order") with respect to imports of viscose rayon staple fiber from Finland. *Id.* at ___, Slip Op. 94-120. Plaintiffs propose to the Court that *Kemira I* held that the requirements of paragraphs (i) and (iii) of

19 C.F.R. § 353.25(d)(4) are mandatory. *Plaintiffs' Brief* at 11. However, plaintiffs misinterpret *Kemira I*, to state that, because Commerce failed to publish a notice of intent to revoke by the first day of the Order's anniversary month as is required by § 353.25(d)(4)(i), revocation of the outstanding Order became mandatory.

In *Kemira I*, 18 CIT at ___, Slip Op. 94-120, the anniversary month was March. No administrative review had been requested for four consecutive annual anniversary months. In the fifth consecutive annual anniversary month, March 1993, § 353.25(d)(4)(i) required that Commerce publish a notice of intent to revoke the Order. Commerce, however, instead published a notice on March 12, 1993 soliciting requests for an administrative review of the Order. No requests ensued. The Court found that, as of March 31, 1993, no interested party had objected to Commerce's proposed revocation of the Order or requested an administrative review as is required by § 353.25(d)(4)(iii). Commerce was obligated to revoke the Order on April 1, 1993. *Kemira I*, 18 CIT at ___, Slip Op. 94-120 at 12-13. The Court held that revocation of the Order became mandatory because the regulation imposed an adverse consequence for failure to meet the regulatory deadline. The Court stated, "the adverse consequence of no interested party having objected or requested an administrative review by the last day of the fifth anniversary month was that Commerce would revoke the Finding, therefore, the directive of section 353.25(d)(4)(iii) is mandatory." *Id.* at ___, Slip Op. 94-120 at 12-13. The Court granted a preliminary injunction because it concluded that "no administrative review should have been commenced." *Id.* at ___, Slip Op. 94-120 at 13. Thus, the Court's decision turned on the requirements of § 353.25(d)(4)(iii), not those of § 353.25(d)(4)(i).

Kemira II, 18 CIT at ___, Slip Op. 94-139, which decided *Kemira's* case on the merits, clarified that the Court had not based its decision in *Kemira I* on any failure by Commerce to publish on the first day of the Order's anniversary month a notice of intent to revoke. *Id.* at ___, Slip Op. 94-139 at 9-10. In fact, in that case, the Court indicated a willingness to deem a procedural defect in meeting the requirements of paragraph (i) cured if Commerce had published the requisite notice during the Order's fifth anniversary month. *Id.* at ___, Slip Op. 94-139 at 12. In the instant case, on May 2, 1991 and May 3, 1994, Commerce published notices of intent to revoke the Order. Commerce was late with these publications by one and two days respectively. 19 C.F.R. § 353.25(d)(4)(i). However, Commerce published the requisite notices at a reasonable time during the appropriate anniversary month. The Court has not held that Commerce must strictly adhere to § 353.25(d)(4)(i). Therefore, the Court finds that, with regard to 1991 and 1994, plaintiffs' § 353.25(d)(4)(i) argument is without merit.

Further, with regard to these notices, the assertion or implication that the domestic industry's responses were invalid because the notices were late, is similarly meritless.

On May 30, 1991, the Cast Iron Pipe Fittings Committee objected to Commerce's proposed revocation of the Order. Further, on May 4, 1994, Grinnell, Ward and Stockham requested an administrative review. In both years, the interested parties acted by the last day of the fifth annual anniversary month, thereby meeting the regulatory deadline. 19 C.F.R. § 353.25(d)(4)(iii). Consequently, Commerce was not obligated to revoke the Order. Hence, with regard to 1991 and 1994, plaintiffs' § 353.25(d)(4)(iii) argument fails.

In 1992, Commerce concedes that it failed to publish a notice of intent to revoke the Order. Further, the facts show that prior to expiration of the Order's fifth annual anniversary month, no interested party requested an administrative review of the Order or questioned Commerce's failure to publish a notice of intent to revoke. Therefore, pursuant to § 353.25(d)(4)(iii), plaintiffs had a cause of action against Commerce, on June 1, 1992, for failure to revoke the Order. However, plaintiffs are precluded from pursuing the matter because they did not contest Commerce's failure to revoke until September 9, 1994—more than two years after the date that their cause of action first accrued.

Plaintiffs' carry the burden of demonstrating that the Court of International Trade has jurisdiction to rule on their claim. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Smith Corona Group. SCM Corp. v. United States*, 8 CIT 100, 102, 593 F. Supp. 415, 417-18 (1984).

Plaintiffs predicate jurisdiction in this action on 28 U.S.C. § 1581(i) (1988).⁴ *Plaintiffs' Brief* at 6-8. Section 1581(i), the residual jurisdiction provision, confers exclusive jurisdiction upon the court concerning issues relating to the antidumping duty law which are not specifically covered by other subparagraphs of section 1581. This provision may be invoked as a basis for subject matter jurisdiction where another subsection of § 1581 is unavailable or when the remedy provided by the other subsection would be "manifestly inadequate." See *Kemira I*, 18 CIT at ___, Slip Op. 94120 at 5-8. See also *Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Plaintiffs claim that jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988) would be manifestly inadequate as, if plaintiffs are required to participate in an administrative review in order to invoke the court's

⁴ Section 1581(i) states, in part, as follows:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i) (1988)

jurisdiction, their challenge with regard to the legality of the review would be moot. *Plaintiffs' Brief* at 8. In support of their claim, plaintiffs cite several cases including, *Kemira I*, 18 CIT at ___, Slip Op. 94-120 at 7-8, and *Asocoflores*, 13 CIT at 586-87, 717 F. Supp. at 850.

Although jurisdiction would be proper under 28 U.S.C. § 1581(i) in the context at issue, pursuant to 28 U.S.C. § 2636(h) (1988),⁵ any cause of action brought under 28 U.S.C. § 1581(i) must be brought within two years of the date that the cause of action first accrues. Accordingly, plaintiffs' cause of action is no longer judicially cognizable and plaintiffs are without recourse against Commerce with respect to 1992.

With regard to 1993, plaintiffs may have had a cause of action against Commerce for failure to revoke the order on June 1, 1993 pursuant to § 353.25(d)(4)(iii). However, Commerce published a notice on September 30, 1993 announcing its determination not to revoke the Order. *Determination Not to Revoke Order*, 58 Fed. Reg. at 51,057. Therefore, in this case, unlike in *Kemira I*, plaintiffs had an agency determination before them that they could appeal.

If plaintiffs were dissatisfied with Commerce's final determination not to revoke the Order, plaintiffs had an adequate remedy under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a (1988), pursuant to 28 U.S.C. § 1581(c), this court has jurisdiction over all actions commenced under section 516A of the Tariff Act of 1930. Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a provides, in relevant part:

§ 1516a Judicial review in countervailing duty and anti-dumping duty proceedings.

(a) Review of determination

* * * * *

(2) Review of determinations on record

(A) In general

Within thirty days after—

(i) *the date of publication in the Federal Register of—*

(I) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph B, or

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

* * * * *

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting

⁵ § 2636 Time for commencement of action.

(h) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title * * * is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

* * * * *

(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.

19 U.S.C. § 1516a (1988) (emphasis added).

Thus, pursuant to 19 U.S.C. § 1516a, plaintiffs had 30 days from the determination's publication date, September 30, 1993, to initiate an action in this court contesting Commerce's decision not to revoke the Order. Plaintiffs failed to initiate any action. Having failed to do so, plaintiffs may not now resort to the residual jurisdiction of this court. Therefore, plaintiffs have no recourse against Commerce with regard to 1993.

This case is distinguishable from *Kemira I* in that, in the case at bar, interested parties objected to Commerce's proposed revocation on at least two occasions and Commerce responded by issuing determinations not to revoke the Order. Hence, plaintiffs had significant opportunity to make their present arguments. If Commerce's determinations not to revoke the Order were objectionable, plaintiffs should have initiated a counter action. See, e.g., *Wear Me Apparel Corp. v. United States*, 1 CIT 60 (1980) (where plaintiff knew of impending irreparable harm for months, the Court denied the injunction because a plaintiff "who has not acted diligently to pursue its administrative remedies cannot * * * be permitted to benefit by its past inaction in pursuit of the present application"). However, plaintiffs failed to appeal Commerce's actions. Plaintiffs' failure to react maintained the status quo and the Order remained in effect. Further, in this case, unlike in *Kemira I*, the domestic industry's 1994 request for an administrative review of the Order was made at a point in time when the Order was still in effect. Moreover, the request for an administrative review was made in conformity with Commerce's requirements and Commerce properly followed the review initiation process. See 19 C.F.R. § 353.22(a); 19 U.S.C. § 1675a.

By their dilatory actions, plaintiffs have shown that any hardship to them is remote and insignificant.

CONCLUSION

In sum, plaintiffs have not convinced the Court to grant the extraordinary relief requested. Plaintiffs' motion for a preliminary injunction is therefore denied and the underlying TRO is dissolved.

(Slip Op. 94-157)

TIMKEN CO., PLAINTIFF V. UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92-03-00163

Plaintiff moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record. Plaintiff specifically objects to the following actions of the Department of Commerce, International Trade Administration ("Commerce"): (1) circumstance of sale adjustment to foreign market value to offset the effect of forgiven Japanese value added tax; (2) use of the highest weighted average margin as best information available; (3) adjustment of foreign market value for pre-sale inland freight; (4) use of the Japanese short-term interest rate in calculating imputed interest expenses; (5) treatment of subject merchandise admitted into foreign trade zones; (6) failure to collect interest for underpayment of antidumping duties; and (7) clerical errors.

Held: Plaintiff's motion is granted in part and this case is remanded to Commerce for: (1) application of the rate of Japanese value added tax forgiven to United States price, calculated at the same point in the stream of commerce where the Japanese value added tax is applied for home market sales, and addition of the resulting amount to United States price, without a circumstance of sale adjustment to foreign market value; (2) denial of the adjustment to foreign market value for home market pre-sale freight expenses where foreign market value was calculated using purchase price; and (3) correction of any clerical errors.

[Plaintiff's motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated October 7, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, John M. Breen, Amy S. Dwyer and Margaret E.O. Edozien) for plaintiff, The Timken Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrensis*, Assistant Director); of counsel: *Joan L. MacKenzie*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer and Niall P. Meagher) for defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Donohue and Donohue (Joseph F. Donohue, Jr. and Kathleen C. Inguaggiato) for defendant-intervenors, NSK Ltd. and NSK Corporation.

OPINION

TSOUICALAS, Judge: Plaintiff, The Timken Company ("Timken"), challenges certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of administrative review of certain tapered roller bearings ("TRBs") from Japan. *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 57 Fed. Reg. 4,975 (Feb. 11, 1992).

BACKGROUND

In 1987, Commerce published an antidumping duty order on TRBs from Japan. *Antidumping Duty Order; Tapered Roller Bearings and*

Parts Thereof, Finished and Unfinished, From Japan, 52 Fed. Reg. 37,352 (Oct. 6, 1987).

In May of 1991, Commerce published the preliminary results of the 1989-90 administrative review. *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 23,278 (May 21, 1991).

In February of 1992, Commerce published the final results which are at issue herein covering the period August 1, 1989 through July 31, 1990, *Final Results*, 57 Fed. Reg. at 4,975, as amended by *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Amended Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 9,105 (March 16, 1992).

Timken moves pursuant to Rule 56.2 of the Rules of this Court, alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) circumstance of sale ("COS") adjustment to foreign market value ("FMV") to offset the effect of forgiven Japanese value added tax ("VAT"); (2) use of the highest weighted average margin as best information available ("BIA"); (3) adjustment of foreign market value for pre-sale inland freight; (4) use of the Japanese short-term interest rate in calculating imputed interest expenses; (5) treatment of subject merchandise admitted into foreign trade zones ("FTZs"); (6) failure to collect interest for underpayment of antidumping duties; and (7) clerical errors.

DISCUSSION

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by Commerce in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. COS Adjustment to FMV for Forgiven VAT:

Timken alleges Commerce erred in making a circumstance of sale adjustment to foreign market value for the Japanese value added tax forgiven on exports. Timken states Commerce acted contrary to 19 U.S.C. § 1677a(d)(1)(C) (1988) which requires an upward adjustment to United States price ("USP") for VAT not collected on exports to the United States, to make USP comparable to home market prices that already include the fully-assessed VAT. In accordance with this provision, decisions of this Court and *Zenith Elec. Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), Timken urges this Court instruct Commerce to recalculate the margin with an adjustment only to USP and without a

COS adjustment to FMV. *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record* ("Timken's Brief") at 13-16.

Defendant agrees with Timken and requests that this issue be remanded for a recalculation of the dumping margins without a COS adjustment. *Defendant's Memorandum in Opposition to plaintiff's Motion for Judgment Upon the Agency Record* ("Defendant's Brief") at 6-7.

In *Zenith*, the Federal Circuit held that Commerce may not make a COS adjustment to FMV to account for home market VAT. *Zenith*, 988 F.2d at 1580-82. The Court noted that adjusting USP alone distorted the dumping margin, as a result of a "multiplier effect" inherent in the way taxes are assessed. *Id.* at 1578. The Court, however, concluded that this distortion is inevitable and was clearly contemplated by Congress. *Id.* at 1580-82. The Court held the exporters responsible for the multiplier effect and did not require any accounting or compensating for the effect. *Id.* In what is clearly dicta, the Court did, however, contemplate that Commerce could eliminate the multiplier effect by adjusting USP by amount, rather than by rate, of *ad valorem* tax. *Id.* at 1582. The dicta appear in footnote 4:

[19 U.S.C. § 1677a(d)(1)(C)] by its express terms allows adjustment of USP in the *amount* of taxes on the merchandise sold in the country of exportation. While perhaps cumbersome, Commerce may eliminate the multiplier effect by adjusting USP by the amount, instead of the rate, of the *ad valorem* tax.

Id.

On the basis of that language, defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") suggest this Court require Commerce adjust USP in this case by the amount, and not the rate, of the forgiven VAT. *Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Agency Record* ("Koyo's Brief") at 3-8. Timken disagrees, arguing Commerce must not adhere to the methodology suggested in the *Zenith* footnote as it is contrary to the substantive holding of the case. *Reply Memorandum of the Timken Company in Support of Motion for Judgment on the Agency Record* ("Timken's Reply") at 1-14.

This Court has already decided this issue and has found that footnote 4 is clearly at odds with the body of *Zenith* and the language of the statute. *Federal-Mogul Corp. v. United States*, 17 CIT ___, ___, 834 F. Supp 1391, 1396-97 (1993). This Court declines to depart from its previous interpretation of *Zenith*, which is to require Commerce adjust USP by the rate of VAT forgiven in the foreign market, and not by the amount of forgiven VAT. *Id.*

Therefore, this issue is remanded so that Commerce may apply the rate of Japanese VAT forgiven to USP, calculated at the same point in the stream of commerce where the Japanese VAT is applied for home market sales, and add the resulting amount to USP, without a COS adjustment to FMV.

2. Use of the Highest Weighted Average Margin as BIA:

Commerce requested the respondents to report home market sales of the first four TRB models selected as "such or similar" according to Commerce's five-criterion model match methodology. Koyo and defendant-intervenors NSK Ltd. and NSK Corporation ("NSK") did not comply completely with Commerce's request and Commerce consequently resorted to BIA in those instances. Commerce selected the highest weighted average margin for the period of review, the 16.35% margin calculated for Koyo, as BIA. *Final Results*, 57 Fed. Reg. at 4,978.

Timken alleges that Commerce's application of Koyo's weighted average margin as best information available when home market sales information was not supplied was an abuse of discretion and contrary to law. Stating that the BIA rule is one of adverse inference and that it is not within Commerce's discretion to select neutral or favorable information for a non-cooperative Party, Timken asserts Commerce should have selected as BIA the highest rates calculated for Koyo and NSK for any previous review. *Timken's Brief* at 17-26.

Commerce responds that it properly exercised its broad discretion in selecting BIA. Commerce states it has complied with its two-tier BIA methodology in that it has selected the highest published rate found in the review for the same class or kind of merchandise from the same country of origin. *Defendant's Brief* at 7-9.

Koyo asserts Commerce's use of BIA where Koyo's model match methodology did not conform to Commerce's methodology should be upheld because of Commerce's broad discretion to select BIA and its reasonable exercise of that discretion in this instance. In addition, Koyo argues that it could not be characterized as a noncooperative party simply because its approach to the complicated task of matching U.S. and home market sales did not comply exactly with that of Commerce. *Koyo's Brief* at 8-10.

With respect to its model match methodology for its merchandise, NSK reiterates the arguments made by Commerce and Koyo. *Memorandum of NSK Ltd. and NSK Corporation in Opposition to Motion of The Timken Company for Judgment Upon the Agency Record* ("NSK's Brief") at 14-18.

This Court finds that the antidumping statute is silent as to what constitutes best information available. 19 U.S.C. § 1677e (1988). Because Congress explicitly left a gap for the agency to fill, it is within Commerce's discretion to decide what constitutes best information available in a particular case and this Court must grant that decision considerable deference. *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191-92 (Fed. Cir. 1993). It is therefore within Commerce's discretion not to choose BIA most adverse to non-cooperating parties. *Saha Thai Steel Pipe Co. v. United States*, 17 CIT ___, ___, 828 F. Supp. 57, 62-64 (1993).

This Court finds that Commerce exercised its discretion in this matter reasonably and in accordance with law. Commerce explained its choice of BIA:

Where the Department's model match resulted in a different choice than Koyo's [or NSK's] model match, and where home market sales information was not submitted for that particular model, we have applied the highest weighted average margin for the period of review as BIA when that model is chosen as the such or similar home market model.

Final Results, 57 Fed. Reg. at 4,978.

Therefore, this Court finds that Commerce's choice of BIA in this case is supported by substantial evidence and in accordance with law and is hereby affirmed.

3. Pre-sale Inland Freight Adjustment to FMV:

Commerce adjusted FMV for home market pre-sale movement expenses incurred during the transport of merchandise from the factory to the warehouse or distribution center. Timken argues that treating home market pre-sale inland freight expenses as direct selling expenses is contrary to law. For support, Timken relies on 19 U.S.C. § 1677b(a)(4) (1980), its legislative history and case law which suggest that adjustments to FMV should be limited to selling expenses directly related to the sales under consideration. Timken argues that, as pre-sale freight expenses may not relate to a home market transaction, they should not be deducted as direct selling expenses, and Commerce's act in so doing was *ultra vires*. *Timken's Brief* at 27-33.

Commerce acknowledges that 19 U.S.C. § 1677a(d)(2)(A) requires that it reduce USP by any expenses "incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A). Commerce regulations, contained in 19 C.F.R. § 353.41(d)(2)(i) (1992), similarly provide for an adjustment to USP for all movement expenses incurred on United States sales, regardless of when they are incurred. Thus, Commerce argues, the current antidumping duty law requires Commerce to deduct all movement expenses incurred, even those incurred prior to sale, on United States sales in order to establish the ex-factory price for sales comparison purposes. Pursuant to these provisions, Commerce must deduct all inland freight expenses incurred on U.S. sales in order to establish the ex-factory price for comparison to FMV. However, no corresponding provision exists with regard to inland freight expenses incurred in the home market. *Defendant's Brief* at 9-15.

Nonetheless, Commerce argues that by denying an adjustment for pre-sale inland freight expenses to FMV, Commerce essentially would compare an ex-factory price in the United States to an ex-warehouse price in the home market. By deducting pre-sale inland freight expenses from FMV in the home market, Commerce is able to compare U.S. ex-factory prices with their counterpart in the home market. *Id.*

Koyo and NSK agree with Commerce and urge this Court to affirm Commerce on this issue. *Koyo's Brief* at 11-13; *NSK's Brief* at 18-24.

It is well-established that when Congress has included specific language in one section of a statute but has omitted it from another related section of the same act, it is generally presumed that Congress intended the omission. *Russello v. United States*, 464 U.S. 16, 23 (1983). In the case at issue, therefore, Congress evidently intended the omission of a provision requiring an adjustment for inland freight expenses incurred in the home market.

The Court of Appeals for the Federal Circuit, in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401-02 (Fed. Cir. 1994), *petition for cert. filed* (May 27, 1994), stated:

* * * we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. See 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

The *Ad Hoc Comm.* court, however, limited its decision to the calculation of FMV in purchase price situations only. *Id.* at 400. As it is not clear to this Court whether FMV was calculated in this case using purchase price or ESP, this Court remands this issue to Commerce to deny the adjustment to FMV for pre-sale home market transportation expenses only if FMV was calculated using purchase price.

4. Inventory Carrying Cost:

In the preliminary results, Commerce calculated inventory carrying cost based on U.S. interest rates, but in the final results, Commerce recalculated the U.S. inventory carrying cost of NSK's U.S. subsidiary, NSK Corporation ("NSKC"), using NSK's short-term interest rate in Japan. *Final Results*, 57 Fed. Reg. at 4,984.

NSK objected to Commerce's use of the U.S. short-term credit rate in the calculation of inventory carrying cost in the preliminary results. Because NSKC had six months to pay for the imported merchandise, NSK argued that, as the parent company, it incurred the cost of keeping the goods in inventory for the subsidiary. NSK contended that because the time value of its funds was being measured, and because NSK would borrow at the lower rate in Japan according to reasonable commercial

practice, Commerce should use the home market interest rate to impute the U.S. inventory carrying cost. Commerce agreed with NSK's position, stating:

Normally, the Department calculates U.S. inventory carrying cost using the U.S. interest rate because the U.S. subsidiary bears the full cost of carrying the merchandise. However, as per *High Information Content Flat Panel Displays and Display Glass Thereof From Japan* (July 16, 1991, 56 FR 32399), if the payment terms that the parent extends to its subsidiary, in combination with the time the merchandise remains in the subsidiary's inventory, indicates that the parent bears the cost of carrying the merchandise for a portion of time the merchandise is in inventory, then the parent's short-term interest rate will be used to calculate that portion of the inventory carrying cost. Accordingly, we have recalculated NSKC's U.S. inventory carrying cost using NSK's short-term interest rate for the time that NSK bears the cost of carrying the inventory.

Final Results, 57 Fed. Reg. at 4,984.

Timken claims that Commerce has not "articulated any reasoned basis for departing from its established precedent" because the published determinations do not reveal, for example, whether the U.S. importers in question had access to foreign currency loans. *Timken's Brief* at 38-39.

Timken maintains that given the facts of this case, Commerce should use the U.S. borrowing rate to measure the cost of storing merchandise in the United States by reference to the opportunity cost faced by the exporter, NSKC. Commerce's use of the Japanese short-term rate for the portion of time the cost was allegedly borne by NSK is contrary to the purpose of imputing a credit expense, and is contrary to long-standing agency practice. Absent a reasonable basis for departing from that practice which has been affirmed by this Court, Timken argues, Commerce's determination here should be reversed and remanded. *Timken's Brief* at 34-40.

Commerce disputes Timken's arguments and adheres to its rationale set out in the final results. Commerce points out that in this case, the Japanese parent shipped the merchandise to its U.S. subsidiary and permitted it to pay at a later time. Therefore, Commerce had to determine the value of the delayed payment, which was the lost opportunity cost to the parent. Commerce argues it was therefore reasonable to calculate the imputed interest expense using the cost of borrowing in Japan. *Defendant's Brief* at 15-20.

NSK states that all the time its goods were in inventory, NSKC had no inventory carrying cost because it had not paid for the goods. On the other hand, NSK, the parent company, bore the cost of maintaining the inventory in the United States. Commerce, therefore, properly calculated the cost using the credit rate in Japan. *NSK's Brief* at 24-28.

Pursuant to 19 U.S.C. § 1677a(e)(2) (1988), Commerce must make a reduction to ESP in the amount of any "expenses generally incurred by

or for the account of the exporter." Contrary to Timken's assertion, the site or location at which the selling expenses are incurred is not determinative for making these adjustments under 19 U.S.C. § 1677a(e)(2). *Daewoo Elecs. Co. v. United States*, 13 CIT 253, 270, 712 F. Supp. 931, 948 (1989), *aff'd in part and rev'd in part*, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3825 (U.S. 1994).

Commerce having found that the Japanese parent company, NSK Ltd., bore the cost of maintaining the inventory in the United States, there is no reason why the U.S. subsidiary could not have benefitted from its parent's ability to borrow money in the home market at the home market interest rate. *LMI-La Metallii Industriale, S.p.A. v. U.S.*, 912 F.2d 455, 460-61 (Fed. Cir. 1990). Having explained its actions, the Court finds that Commerce's adjustment of FMV for inventory carrying costs was reasonable and in accordance with law and is sustained.

5. *Treatment of Subject Merchandise Admitted to FTZs:*

Although Timken concedes that Commerce is not required to collect antidumping duty deposits for TRBs subject to an antidumping duty order admitted into a FTZ, Timken contests Commerce's failure to obtain information on such merchandise. Timken asserts Commerce's failure to document the volume and value of all entries and to verify with the Customs Service their liquidation status ("privileged" or "non-privileged") was an abuse of discretion and contrary to law. Timken seems to suggest that a failure to gather information upon the entry of TRBs into FTZs will result in a failure to collect antidumping duty deposits when the TRBs leave FTZs and enter the customs territory of the U.S. *Timken's Brief* at 40-43.

Commerce disputes Timken's assertions. Commerce points out it does not know of any and Timken did not reference a statute or regulation which require Commerce to collect information on subject TRBs entered into FTZs. Since Congress did not intend that duties be assessed or estimated duties be collected upon such merchandise, Commerce asserts it was not required to collect information. Commerce states that when the TRBs are entered into the customs territory of the U.S., that will be the time to include TRBs in an administrative review and to collect information regarding them. *Defendant's Brief* at 20-22.

NSK agrees with Commerce that since antidumping duties were not assessable, Commerce was not required to monitor the entries. Further, NSK states that it did not import any in-scope merchandise into a FTZ and, therefore, there was no relevant information to collect with respect to NSK FTZ merchandise. *NSK's Brief* at 28.

The Court finds Timken's position to be without merit. Commerce is quite right that there is no requirement that the volume, value, liquidation status or other information regarding merchandise subject to an antidumping duty order be collected upon its entry into a FTZ. 15 C.F.R. § 400.33(b)(1) (1992) mandates that FTZs "shall not be used to circumvent antidumping and countervailing duty actions." It is well-established that it is upon the entry of subject merchandise into the customs

territory of the U.S. that the merchandise is subject to the customs laws. *Torrington Co. v. United States*, 17 CIT ___, ___, 826 F. Supp. 492, 494 (1993). Thus, Commerce is required to include the merchandise in an administrative review and collect information only upon the entry of the merchandise into the customs territory of the U.S. Accordingly, the Court finds Commerce's action to be reasonable and in accordance with law and is hereby sustained.

6. Interest on Underdeposit of Antidumping Duties:

Commerce did not hold Koyo and NSK liable for interest on underdeposits of antidumping duties assessed on entries of TRBs when they had not been ordered to make cash deposits and had instead posted bonds. *Final Results*, 57 Fed. Reg. at 4,975-76.

Timken alleges that pursuant to 19 U.S.C. § 1677g (1988), Koyo and NSK are liable for interest on underpayments of amounts deposited to secure antidumping duties, regardless of whether the security was made in the form of bonds or cash. Timken respectfully asserts the Court's previous findings to the contrary contradict the construction of the statute and congressional intent. *Timken's Brief* at 44-51.

Commerce and defendant-intervenors argue that defendant-intervenors are not liable for interest on underdeposits of antidumping duties because payment of interest is tied to deposits and Koyo and NSK were not required to make estimated duty deposits upon their entries. *Defendant's Brief* at 22-30; *Koyo's Brief* at 13-16; *NSK's Brief* at 28-30.

Commerce explained its decision, stating:

*** the only statutory authorization for assessing or paying interest on underpayments or overpayments of amounts deposited for antidumping duties in section 737(b), which provides that if the amount of an estimated antidumping duty deposited under section 736(a)(3) is different from the amount of the antidumping duty determined under an antidumping duty order issued under section 736, then the difference shall be (1) collected, to the extent that the deposit under section 736(a)(3) is lower than the duty determined under the order, or (2) refunded, the extent that the deposit under section 736(a)(3) is higher than the duty determined under the order, together with interest as provided by section 778. The amount of estimated antidumping duty deposited referred to in section 736(a)(3) is only a cash deposit, not a bond. See also, 19 CFR 353.24. Cash deposits were first required on entries of this merchandise manufactured by Koyo and NSK on June 1, 1990. Consequently, interest will only be collected or refunded on under- or overpayments of cash deposits on entries after that date. The Department's interpretation has been upheld by the CIT (*Timken v. United States*, Slip Op. 91-95, October 25, 1991).

Final Results, 57 Fed. Reg. at 4,975-76.

This issue has already been ruled upon by the Court in *Timken Co. v. United States*, 16 CIT 999, 1001, 809 F. Supp. 121, 122-23 (1992) ("[19 U.S.C. § 1677g] is clear on its face that interest is collectable only on deposits and not on bonds"); see also *Timken Co. v. United States*,

15 CIT 526, 535, 777 F. Supp. 20, 27 (1991). The Court adheres to its decision in those cases. Further, the Federal Circuit has recently affirmed the holding in *Timken* 16 CIT 999, 809 F. Supp. 121. *Timken Co. v. United States*, Nos. 93-1312, -1455, Slip Op. at 13-16 (Fed. Cir. Sept. 27, 1994) ("Section 1677g(a)'s 'amounts deposited' language does not encompass bonds. ITA and the trial court interpreted the above statutory scheme correctly by restricting the term 'amounts deposited' in section 1677g(a) to cash deposits.").

Therefore, without a duty order, Koyo and NSK did not have an obligation to make a cash deposit and consequently, had no obligation to pay interest. Commerce's interpretation of the statutory scheme and decision not to impose interest in this case are hereby sustained.

7. Clerical Errors:

Timken alleges Commerce committed two clerical errors which should be remanded for correction. *Timken's Brief* at 52-53. Commerce and Koyo agree that correction of these errors is in order. *Defendant's Brief* at 6; *Koyo's Brief* at 3.

Koyo alleges Commerce committed two additional clerical errors. First, Koyo alleges Commerce failed to restrict product matches to the same bearing part type, in matching only those products which had the same part type and the same number of rows sequentially, rather than in conjunction with one another. Second, Koyo alleges Commerce failed to treat identical matches ahead of similar matches. Koyo disputes the short order used by Commerce because it places the sum of the deviations ahead of identicalness or similarity. *Koyo's Brief* at 16-18. Timken responds that Koyo should not be permitted to raise additional claims in the context of Timken's civil action and should address them in the remand proceeding or in its own civil action. *Timken's Reply* at 28.

The Court finds Timken's contention that Koyo is precluded from bringing a clerical error to the attention of the Court to be without merit. This Court is "loathe to affirm a determination that might be based on a questionable record." *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce*, 12 CIT 825, 834, 696 F. Supp 665, 673 (1988). Therefore, Commerce is Instructed to consider whether any clerical errors were committed, including in its consideration those alleged by Koyo, and correct any errors it finds.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce for: (1) application of the rate of Japanese VAT forgiven to USP, calculated at the same point in the stream of commerce where the Japanese VAT is applied for home market sales, and addition of the resulting amount to USP, without a COS adjustment to FMV; (2) denial of the adjustment to FMV for home market pre-sale freight expenses where FMV was calculated using purchase price; and (3) correction of any clerical errors. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this

opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 94-158)

CASIO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89-07-00385

[Plaintiff challenges Customs' classification under item 725.47, TSUS, of certain models of imported keyboard synthesizers, and other devices that plaintiff claims is classifiable under item 688.34, or in the alternative under item 688.42, TSUS. *Held:* Plaintiff has failed to overcome the presumption that Customs' classification of the subject merchandise excluding models HZ-600, MG-S 10, PG-380, VZ-1, and VZ-10M is correct. With respect to models HZ-600, MG-S 10, PG-380, VZ-1, and VZ-10M, the Court holds that plaintiff has overcome the presumption that Customs' classification is correct, and that these models are properly classifiable under item 688.34 and not under item 725.47, TSUS.]

(Decided October 7, 1994)

Grunfeld Desiderio, Lebowitz & Silverman (Steven P. Florsheim, David L. Simon) for plaintiff.

Frank W. Hunger, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Susan Burnett Mansfield) for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff challenges the United States Customs Service ("Customs") classification of certain models of imported keyboard synthesizers pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515(a) (1988). The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

The subject merchandise consisting of certain models of keyboard synthesizers was entered during the years 1987 and 1988, through the ports of Los Angeles, New York, Chicago, and Dallas/Ft. Worth, in some thirty entries.¹ Customs classified all these articles under item 725.47, TSUS, as "Electronic musical instruments * * * Other," dutiable at the rate of 6.8% *ad valorem*. Plaintiff claims that certain functions and features in the majority of the subject articles, over and above their musical

¹ The Casio model numbers at issue in this case are as follows: CDP-3300, CPS-101, CPS-300, CT-360, GF-370, CT-450, CT-460, CT-S 10, CT-607, CT-630, CT-640, DH-100, DH-200, EP-10, EP-20, EP-30, HT-3000, HT-6000, HZ-600, MG-S 10, MT-140, MT-205, MT-240, MT-520, MT-540, MT-600, MT-640, PG-380, PMP-300, PMP-400, PMP-500, PT-10, PT-180, PT-87, SK-1, SK-10, SK-S, SK-8, VZ-1, VZ-10M.

instrument function, render them more than musical instruments.² Furthermore, plaintiff asserts that some of the articles do not have speakers and audio amplifiers which renders them incapable of producing audible sound.³ Consequently, plaintiff argues that the imported articles are not musical instruments, thus, not classifiable under item 725.47, TSUS.

Plaintiff argues that the subject articles should be classified under item 688.34, TSUS. This classification provides for: "Electrical articles and electrical parts of articles, not specifically provided for: Electrical articles using pre-programmed digital integrated circuits to produce sound," dutiable at the rate of 3.9% *ad valorem*. Alternatively, plaintiff argues that item 688.42, TSUS, is applicable. This provision covers "Electrical articles and electrical parts of articles not specially provided for: * * * Other: * * * Other." The duty rate for this provision is also 3.9% *ad valorem*.

STANDARD OF REVIEW

Customs' classification decision is presumed to be correct and the party challenging the decision has the burden of overcoming this statutory presumption. 28 U.S.C. § 2639(a)(1) (1988). To determine whether an importer has overcome the statutory presumption, the Court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

STATEMENT OF FACTS

Each of the subject articles (with the exception of the guitar-based and saxophone-based models and the VZ-10M) consists of a keyboard-driven synthesizer. Each article includes one or more of the following features:

ROM pack—computer chip driven device containing ROM ("ready-only memory") which is pre-programmed to play a melody on the keyboard.

Sampling—is the ability to capture a sound (by digital recording) and play it back when triggered. The hardware required is a microphone and circuitry to digitize the sound and store it for subsequent recall.

Sequencer—a recording device that "remembers" sequences of key depressions and digital events. In other words, its memory consists of the succession of keys which the player depresses on the keyboard, together with the timing of the keystrokes. The recorded sequence—from a phrase to an entire composition, depending on the sequencing capabilities—can then be played back and manipulated. The sequencer also permits the overlay of additional sounds produced by other musical devices, so that multiple "tracks" can be overlaid atop one another.

² See "Statement of Facts" in this opinion for a detailed discussion of the functions and features at issue.

³ The following Casio models do not contain speakers and audio amplifiers: HZ-600, MG-510, PG-380, VZ-1, and V-10M.

Auto-rhythm—generates a rhythm selected from a number of pre-programmed rhythms (e.g., samba, disco, march).

Auto accompaniment—generates an accompaniment of "fill-in" notes automatically for the keys depressed by the user on the right side of the keyboard.

Mixer—device that permits the adjustment of relative volumes of sounds produced by various electronic musical devices.

DISCUSSION

Plaintiff asserts that 725.47, TSUS, is an *eo nomine* tariff provision.⁴ Therefore, plaintiff contends that if the articles at issue are "more than" musical instruments, they are not classifiable under that tariff provision. *Pretrial Brief On Behalf Of Casio, Inc.* ("Casio Pretrial Brief"), at 8.

Plaintiff cites to *Robert Bosch Corp. v. United States*, 63 Cust. Ct. 96, 103-4, C.D. 3881 (1969) which defines the "more than" principle as follows:

[W]here an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute.

Casio Pretrial Brief, at 9.

Plaintiff argues that the articles in question are not merely musical instruments within the design of item 725.47, TSUS. Rather, the presence of additional, non-musical instrument features listed above in the "Statement of Facts" renders them more than musical instruments, and therefore takes them outside the ambit of item 725.47, TSUS. *Casio Pretrial Brief*, at 10. Moreover, plaintiff argues that these additional features are not of incidental or minor significance—these additional features give the articles their essential character as home entertainment devices. Plaintiff argues that the non-musical instrument features of the subject articles, combined with their musical instrument function, renders them what is commonly referred to as "music systems" or "music workstations." *Id.* at 10-11.

In addition, plaintiff claims that these articles are not generally marketed as musical instruments. Plaintiff asserts that the subject articles are not sold to or through musical instrument stores. Rather, they are marketed predominantly through the electronics departments of general-merchandise retailers and electronics specialty retailers. *Id.* at 13. Plaintiffs cite to *Davis Products, Inc. v. United States*, 59 Cust. Ct. 226, C.D. 3127 (1967) as being instructive. In that case, the Court stated:

In selling these articles to department stores across the nation, the witness Friedlander always dealt with the Christmas decoration buyer, not the toy buyer. Although a merchandise medium may not

⁴ An "eo nomine" designation is one which describes commodity by a specific name, usually one well known to commerce. Ordinarily, use is not a criteria in determining whether merchandise is embraced within *eo nomine* provision, but use may be considered in determining identity of *eo nomine* designation. Black's Law Dictionary 535 (6th ed. 1990).

always be a proper means of determining classification * * * sometimes, conversely, where merchandise is sold in stores having separate and distinct departments, a showing that certain articles are marketed through one department instead of another can have obvious probative value * * *.

59 Cust. Ct. at 230 (emphasis in original).

Plaintiff also argues that label descriptions and advertising phraseology do not dictate tariff classification. Plaintiff argues that its use of the term "Electronic Musical Instruments" as an advertising artifice to entice the general public into purchasing the subject articles does not refute the fact that these articles are more than musical instruments for tariff purposes. *Casio Pretrial Brief*, at 16; see *United States v. Strauss Bros. & Co.*, 6 Ct. Cust. App. 498, T.D. 36125, 30 Treas. Dec. 165, *aff'g*, Abs. 37902 (1916); *Border Brokerage Co. Inc. v. United States*, 64 Cust. Ct. 331, C.D. 3999 (1970).

Lastly, plaintiff claims that five of the articles do not possess audio amplifiers or loudspeakers. While they are capable of producing an electrical signal which could be fed into separately attached audio amplifiers and speakers and thus heard, plaintiff asserts that in their imported condition, these articles are incapable of producing audible sound. Plaintiff argues that according to applicable case law, an article is not classifiable as a musical instrument under item 725.47, TSUS, if it does not produce sound without the attachment of additional devices. Therefore, these five articles are not classifiable under item 725.47, TSUS. See *Montgomery Ward & Co. v. United States*, 61 CCPA 101, C.A.D. 1131, 499 F.2d 1283 (1974); *Universal Accordion Factory v. United States*, 73 Cust. Ct. 208, C.D. 4577 (1947); *Casio Pretrial Brief*, at 16-17.

Defendant argues that when an article is described in two or more tariff provisions, it should be classified under the provision which describes it most specifically. *Defendant's Pretrial Brief*, at 32; see *S.I. Stud, Inc. v. United States*, 17 CIT ___, Slip Op. 93-124 at 17 (July 1, 1993); *A.N. Deringer Inc. v. United States*, 10 CIT 577, 580 (1986). Assuming, *arguendo*, that the subject articles are classifiable under both the provision it was classified by Customs and by one of the provisions claimed by plaintiff, defendant argues that its classification must prevail. *Defendant's Pretrial Brief*, at 2.

Defendant further argues that the meaning of an *eo nomine* provision is determined as of the date of enactment, but that meaning embraces all subsequently created articles that fall within it. The defendant cites to *Davies Turner & Co. v. United States*, 45 CCPA 39, 41-42, C.A.D. 669 (1957) in which the Court states:

The meaning of *eo nomine* provisions is to be determined as of the date of enactment but, when so determined, that meaning will embrace all subsequently created articles which fall within it. Tariff acts, therefore, are made for the future in the sense that they embrace articles not in existence at the time of enactment, but the meaning of words used in such acts is fixed at the time of enactment

and does not fluctuate as the meaning of words might subsequently vary.

Defendant contends that new and improved articles will be classified under the provision for such articles as long as the new articles possess an essential resemblance to the ones named in the statute. See *Smillie & Co. v. United States*, 12 Ct. Cust. App. 365, 367, T.D. 49,520 (1924); *Clairol, Inc v. United States*, 7 CIT 377 (1984); *Defendant's Pretrial Brief*, at 5-6. In other words, where an article has been improved or amplified, but the essential characteristics are preserved or only incidentally altered, then the article is not excluded from an unlimited *eo nomine* statutory designation. See *United Carr Fastener Corporation v. United States*, 54 CCPA 89, C.A.D. 913 (1967); *Defendant's Pretrial Brief*, at 7-8.

Defendant argues that in this case, the features plaintiff claims make the subject articles more than musical instruments are generally improvements that do not change the general character of the merchandise from musical instruments. Moreover, defendant argues that any feature which is not an improvement to the merchandise and does not change its essential character is only incidental. *Defendant's Pretrial Brief*, at 9.

Defendant admits that the courts in *Montgomery Ward & Co. and Universal Accordion Factory, supra*, determined that the capacity to produce electronic sound is the *sine qua non*⁵ of classification as an electronic musical instrument. However, defendant argues that the case law cited by plaintiff has been clarified in a more recent decision in *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States*, 66 CCPA 97, C.A.D. 1228, 600 F.2d 799 (1979). *Post-Trial Brief for United States, Defendant* ("Defendant's Post-Trial Brief"), at 57-63. In *Daisy-Heddon*, the court resolved and clarified the competing tariff provisions for unfinished articles and the various TSUS items pertaining to parts by holding that a substantially complete article is classifiable as an unfinished article despite the omission of an essential part. The court reasoned:

If, as appellant argues, the omission of a part essential to the use of the *eo nomine* designated article would prevent classification as the article in an unfinished condition, there would be, in practical effect, no such thing as an *unfinished* article, since the omission of virtually any part from an otherwise complete article would prevent its use in the manner intended. See *Authentic Furniture Products*, 61 CCPA at 8, 486 F.2d at 1064-65 (Miller, J., *dissenting*). Such is clearly not the intent of Congress, as evidenced by the very existence of General Interpretive Rule 10(h).

66 CCPA at 102, 600 F.2d at 802 (emphasis in original).

⁵ Without which not. That without which the thing cannot be. An indispensable requisite or condition. Black's Law Dictionary 535 (6th ed. 1990).

The guidelines enumerated in *Daisy-Heddon* are as follows:

[T]he following factors can be relevant: (1) comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall function of the completed article; and (5) trade customs, i.e., does the trade recognize the importation as an unfinished article or as merely a part of that article. This list of factors is not exhaustive; it must be recognized that fewer than all of the above factors, or additional facts, may come into play depending on the particular importation.

66 CCPA at 102, 600 F.2d at 803. Defendant argues that applying the *Daisy-Heddon* factors to the case at hand leads to the conclusion that the subject articles are musical instruments within the meaning of item 725.47, TSUS. *Defendant's Post-Trial Brief*, at 57-63.

The "more than" test is one of the basic tests for determining whether an item is within an *eo nomine* classification item. This test is set forth in a number of cases including, *Servo-Tek Products Co. v. United States*, 57 CCPA 13,15, C.A.D. 969, 416 F.2d 1398, 1399 (1969). The ultimate issue in this case is whether the items "possess features substantially in excess of those within the common meaning of the [*eo nomine*] term." *United Carr Fastener Corp. v. United States*, 54 CCPA at 91, *supra*.

Plaintiff relies on two expert witnesses (Dr. Howard Cass⁶ and Dr. Robert Moog⁷) who argue that the subject articles are not musical instruments. Essentially, Dr. Moog's position is that "the essence of all musical instruments, acoustical or electronic, is that the musician has 'real time' control of the instrument he is using to produce music." In other words, the music must be "generated as a result of the contemporaneous transference of the information from the musician's mind to the effector mechanism." *Pretrial Testimony of Dr. Moog*, page 2. Dr. Moog stated that the subject articles contain numerous non-musical instrument features and functions which are co-equal to, or exceed, the importance of their musical instrument capability. *Id.* at page 4. Dr. Moog concluded that each of the articles at issue "is an electrical article which uses preprogrammed digital integrated circuits to produce sound." *Id.*

Dr. Cass' position is that the subject articles are not musical instruments because they incorporate features and functions of separate electronic music devices which are not musical instruments. *Pretrial Testimony of Dr. Cass*, page 7. Dr. Cass testified that "the core instrument is what constitutes, in this case, actually a musical instrument."

⁶ Dr. Howard Cass is a professor of Electronic Music at the Julliard School. His music career spans 17 years, 12 years of which has been devoted to electronic music and the instruments and devices used thereof.

⁷ Dr. Robert Moog is the President of Big Briar, Inc., a company that designs and builds touch sensitive keyboards, and other touch sensitive musical devices that incorporate novel control means. He is credited with being the inventor of the first commercially successful electronic keyboard. He has written and spoken on subjects relating to electronic music technology. In addition, he has consulted for electronic musical instrument manufacturers around the world.

Transcript of Court Testimony of Dr. Cass, page 81. Dr. Cass defines the "core instruments" to be a keyboard, tone generator and added amplification and speakers. *Id.*

The Court has difficulty with the myopic premise seemingly espoused by plaintiff's expert witness Dr. Moog that the essence of all musical instruments is that the musician have "real time" control of the instrument. While the Court does not discredit Dr. Moog's testimony, his testimony is contrary to legislative intent. As noted by defendant, music boxes are obviously articles that do not involve "real time" control in the sense meant by Dr. Moog, yet, they came to be specifically provided for in the Tariff Schedules of the United States as *musical instruments* under item 725.50, TSUS. See *United States v. Borgfedit & Co.*, 13 Ct. Cust. App. 620, 622, T.D. 41461 (1926).

Furthermore, the Court finds Dr. Cass' position to be somewhat problematic. His opinion that an article is not a musical instrument if it incorporates features and functions of separate electronic music devices which are not musical instruments is illogical. As stated above, Dr. Cass defines the "core instrument" to be a keyboard, tone generator, and added amplification and speakers. Given Dr. Cass' view that an article is not a musical instrument if it incorporates features and functions of separate electronic music devices which are not musical instruments, it follows logically then that even the "core instrument" as defined by Dr. Cass is not a musical instrument.

The Court finds Dr. Moog's and Dr. Cass' testimony to shed little light on the issue, and provide inadequate support for plaintiff's classification argument. The Court after careful review of the record, testimony, and exhibits is of the opinion that the subject articles excluding models VZ-1, VZ-10M, HZ-600, MG-S 10, and PG-380 constitute musical instruments within the meaning of 725.47, TSUS, dutiable at the rate of 6.8% *ad valorem*.

The primary design and function of the features at issue appear to become part of and enhance the musical instruments in which they are found. The features that are part of the subject articles make playing the instruments easier. In addition, the features expand the sounds available to be played and permit manipulation of sound to enhance creativity.

The stipulations of the parties further support the classification as musical instruments under item 725.47, TSUS. The merchandise was the responsibility of plaintiff's electronic musical instrument division and the professional musical products divisions. The plaintiff used the terminology "Electronic Musical Instruments" to describe many of the subject articles in its advertising literature and on the boxes containing the merchandise. Furthermore, the invoices of the subject articles denoted them as musical instruments. While the plaintiff has shown that the majority of the subject articles are generally sold in other than musical instrument channels of trade, this provides little support in determining whether the subject articles are not musical instruments.

While not determinative, such facts do have "obvious probative value." See *Montgomery Ward & Co. v. United States*, 62 Cust. Ct. 718, 724, C.F. 3853 (1969). The fact that the subject articles are referred to by plaintiff itself as musical instruments further supports the classification of the articles as musical instruments. See *Schott Optical Glass, Inc. v. United States*, 11 CIT 899, 910-11, 678 F. Supp. 882, 892 (1987), *aff'd* 862 F.2d 866 (Fed. Cir. 1988).

Defendant has additionally directed the Court to the *Standard Industrial Classification Manual* (1987), which, has been relied upon as some indication of legislative intent since it was used by the Tariff Commission as a reference in preparing the tariff schedules. Of significance, is that the *Standard Industrial Classification Manual*, at pages 256-57, recognize new music synthesizers as *musical instruments*. In light of the foregoing legislative intent, the Court finds the electronic synthesizers at issue to be instruments that reflect current technological developments. In other words, the electronic synthesizers at issue are the result of the evolution of musical instruments.

Rejecting plaintiffs classification of the subject articles as "more than" musical instruments under item 688.34, TSUS, the Court also rejects plaintiffs alternative claim that the subject articles are properly classified under item 688.42, TSUS. The Court having classified the subject articles as musical instruments, item 688.42, TSUS, is not applicable.

With respect to plaintiffs argument that models VZ-1, VZ-10M, HZ-600, MG-510, and PG-380 are not musical instruments because they cannot produce audible sound, the Court finds plaintiffs argument persuasive. Although these items are capable of producing an electrical signal which could be fed into separately attached audio amplifiers and speakers and be heard, in their imported condition they do not possess audio amplifiers or loudspeakers.⁸ This issue was resolved in *Montgomery Ward & Co. v. United States*, 61 CCPA 101, CAD. 1131, 499 F.2d 1283 (1974) ("*Montgomery Ward*") in which the Court determined that an electronic organ, complete except for a loudspeaker and a coordinated cabinet, was not classifiable under item 725.47, TSUS. The Court stated in pertinent part:

We therefore have to disagree with the lower court's conclusion that the courtroom demonstration "effectively dramatized" how the imported components, when assembled, "generated sound electrically." They generated nothing more than electrical currents and there was no sound but for the added loudspeaker, which was not among the imported articles. We deem it essential to its classification as a "musical instrument"—in the absence of some indication of legislative intent to the contrary—that there be a capability in an organ of producing sound when played upon.

61 CCPA at 107.

⁸ Model VZ-10M is a tone generator and cannot make sound without a controller as well as an amplifier.

Similarly the Court obtained the same result in *Universal Accordion Factory v. United States*, *supra*, which involved a combination acoustical and electronic accordion, imported without an amplifier. The Court stated in relevant part:

[A] capacity to produce the electronic sound at the time of importation is the *sine qua non* for classification of a musical instrument under item 725.47.

73 Cust. Ct. at 213 (emphasis in original).

Defendants have misapplied the principles enumerated in *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States*, *supra*. The issue in this case does not involve competition between unfinished articles and parts. Plaintiff has made no claim that these five models are "unfinished" articles, or that these articles are properly classifiable as parts. The articles as imported are complete articles of commerce and are sold to the public in their imported condition. It is the responsibility of the consumer to attach the appropriate controller, and/or amplifier and speaker. The issue is whether an article which does not produce sound can be classified as a musical instrument. As stated above, the five models at issue generate nothing more than electrical currents and there is no sound but for the added loudspeaker, which is not among the imported articles. To this date, the appellate court's ruling in *Montgomery Ward, supra*, has not been overruled. Therefore, the Court deems it essential to their classification as "musical instruments" in the absence of case law to the contrary that there be a capability in these articles of producing sound when played upon. Accordingly, since these articles are incapable of producing sound they are not classifiable as electronic musical instruments under item 725.47, TSUS.

The record does establish that these models contain at least one "ROM chip." As defined in the *Statement of Facts*, "a ROM chip" is a integrated circuit. The "ROM chip" is a permanent storage device containing imbedded digital data and instructions which pertains to the production of sound by each article. Accordingly, the Court holds that models VZ-1, VZ-10M, HZ-600, MG-S 10, and PG-380 are properly classifiable under item 688.34, TSUS, as electrical articles using pre-programmed digital integrated circuits to produce sound, dutiable at the rate of 3.9% *ad valorem*.

CONCLUSION

For the reasons discussed above, the Court finds Customs' classification of the subject articles excluding models VZ-1, VZ-10M, HZ-600, MG-S 10, and PG-380 under item 725.47, TSUS, is correct. With respect to models VZ-1, VZ-10M, HZ-600, MG-510, and PG-380, the Court holds that plaintiff has overcome the presumption that Customs' classification is correct, and that these articles are properly classifiable under item 688.34 and not under item 725.47, TSUS. Customs is hereby ordered to reliquidate models VZ-1, VZ-10M, HZ-600, MG-510, and PG-380 under item 688.34, TSUS, and to refund all excess duties with interest as provided by law.

(Slip Op. 94-159)

NEW ZEALAND LAMB CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93-06-00346

[Plaintiff challenges Customs Service's refusal to reliquidate pursuant to 19 U.S.C. § 1520(c) (1988). Defendant moves to dismiss for lack of subject matter jurisdiction, alleging either untimeliness or failure to protest. *Held*: Defendant's Motion to Dismiss granted.]

(Decided October 7, 1994)

Bronz & Farrell, (Edward J. Farrell) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Susan Burnett Mansfield*) for defendant.

OPINION

MUSGRAVE, *Judge*: Defendant moves to dismiss plaintiff's challenge to the United States Customs Service ("Customs") refusal to reliquidate pursuant to 19 U.S.C. § 1520(c)(1) (1988). Defendant contends that the Court lacks subject matter jurisdiction because plaintiff did not protest the denial of its 19 U.S.C. § 1520(c) claim. Plaintiff opposes Customs motion to dismiss this action. The Court finds that it does not have jurisdiction to hear this action, and therefore grants Customs' motion dismissing this case.

BACKGROUND

A single entry of lamb meat from New Zealand was liquidated, as entered, on March 27, 1987. Countervailing duties were deposited in the amount of \$13,095.26.

By letter dated July 1, 1987, plaintiff advised Customs that the liquidation was in error as the merchandise involved was subject to a countervailing duty order under which a final rate had not yet been determined. *See Defendant's Motion to Dismiss*, Exhibit #1. That letter cites 19 C.F.R. § 173.4, the clerical error provision of Customs regulations in requesting the correction of the liquidation.¹ *Id.*

Plaintiff received a handwritten response from Customs dated April 15, 1991. This handwritten response stated: "*Protest filed on July 1, 1987—was untimely. Entry Liq. 3/27/87—last day to file protest (within 90 days of liquidation) was June 26, 1987. Cannot set this up as a protest, it would be untimely*" *See Defendant's Motion to Dismiss*, Exhibit #2.

Plaintiff submitted another letter to Customs dated June 5, 1991. That letter again indicated that plaintiff believed the liquidation to be in

¹ § 173.4 Correction of clerical error, mistake of fact, or inadvertence.

(a) *Authority to review and correct.* Even though a valid protest was not filed, the district director, upon timely application, may correct pursuant to section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)) a clerical error * * *

(c) *Limitation on die time for application.* A clerical error * * * shall be brought to the attention of the district director * * * within one year after the date of liquidation or exaction."

error. Plaintiff referred to its July 1, 1987 letter as a 19 U.S.C. § 1520(c) claim:

The first entry #406-0101227-7 (11/25/86), was the subject of my 520(c) [sic] letter of July 1, 1987, a copy of which is enclosed along with your handwritten response to Patrick Powers of the New Zealand Lamb Company who was following up on these entries in April of this year. Per our discussion, as a 520(c) claim the applicable period for filing is one year, not 90 days. Consequently, can you please set this up accordingly.

See *Defendant's Motion to Dismiss*, Exhibit #3. Customs assigned protest number 5201/92200028 to plaintiffs 19 U.S.C. § 1520(c) claim. See *Defendant's Motion to Dismiss*, Exhibit #4. This assigned number while called a protest number, indicates in fact that a 19 U.S.C. § 1520(c) claim had been made. See *Declaration of Joseph A. DiSalvo*,² Supervisory Customs Liquidator, *Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss*, Exhibit #1.

By letter dated December 21, 1992, Customs responded to plaintiff denying the request for reliquidation of entry number 406-0101227-7. In that letter, Customs advised plaintiff that if it disagreed with Customs decision, plaintiff could file a summons in this Court within 180 days:

"If you disagree with the decision made concerning entry number 406-0101227-7 you may file a summons with the Court of International Trade within one hundred and eighty (180) days of this notice."

Defendant's Motion to Dismiss, Exhibit #5. The summons in this case was filed on June 14, 1993.

DISCUSSION

It is well established that the terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit. *NEC Corp. v. United States*, 806 F.2d 247, 249 (Fed. Cir. 1986), citing *United States v. Testan*, 424 U.S. 392, 399 (1976). Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions. *NEC Corp.*, 806 F.2d at 249, citing *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

Under 28 U.S.C. § 1581(a), this Court possesses exclusive jurisdiction over any civil action commenced to contest the denial of a protest under 19 U.S.C. § 1515. 19 U.S.C. § 1515 provides for the review of protests filed in accordance with 19 U.S.C. § 1514.

Customs argues that plaintiffs 19 U.S.C. § 1520(c) claim was denied by its letter of December 21, 1992. *Defendant's Motion to Dismiss*, at 4. Furthermore, Customs contends that plaintiff did not protest that denial of its 19 U.S.C. § 1520(c) claim. As a consequence, Customs

² Mr. Joseph A. DiSalvo has acted as the Head of the Protest and Control Section of the Residual Liquidation and Protest Branch, New York Region, United States Customs Service. He is familiar with the Customs Automated Commercial System module governing 19 U.S.C. § 1514 protests and 19 U.S.C. 1520(c) petitions. *Declaration of Joseph A. DiSalvo*, Para. 4, *Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss*, Exhibit #1.

argues that even if plaintiff made a timely 19 U.S.C. § 1520(c) claim, this Court lacks jurisdiction in this case because plaintiff did not protest the denial of the claim. *Id.*

Plaintiff argues that its 19 U.S.C. § 1520(c) claim was denied by Customs in its handwritten response to plaintiff on April 15, 1991. *Plaintiff's Opposition to Defendant's Motion to Dismiss*, at 3. In addition, plaintiff argues that Customs denied its June 5, 1991 claim as a protest, advising plaintiff that "If you disagree with the decision made concerning entry number 406-0101277-7 you may file a summons with the Court of International Trade within one hundred and eighty (180) days of this notice." Plaintiff notes that this is the remedy for a denied protest. *Id.* at 4.

Customs' argument is persuasive. The Court cannot exercise jurisdiction over this decision via 28 U.S.C. § 1581(a). After a denial of a claim pursuant to 19 U.S.C. § 1520(c), a plaintiff is required to file a protest. A plaintiff must contest the denial of a protest, denied in whole or in part, before the Court can exercise jurisdiction under 28 U.S.C. § 1581(a).

To recapitulate, the pertinent dates are as follows:

November 25, 1986—entry of merchandise

March 27, 1987—liquidation

July 1, 1987—Plaintiff advised Customs by letter that the liquidation was in error. The letter cited 19 C.F.R. § 173.4, the clerical error provision of Customs regulations in requesting the correction of the liquidation.

April 15, 1991—Handwritten response by Customs stating that protest was untimely (not filed within 90 days of liquidation). As a consequence, Customs informed plaintiff that it could not set up plaintiffs claim as a protest.

June 5, 1991—Plaintiff submitted another letter to Customs objecting to Customs April 15, 1991 denial. Plaintiff characterizes its letter of July 1, 1987 as a 19 U.S.C. § 1520(c) claim and not that of a protest, thus, the applicable period for filing is 1 year not 90 days. Plaintiff requests that its July 1, 1987 letter be set up as a 19 U.S.C. § 1520(c) claim.

December 21, 1992—Customs assigned a "protest number" to plaintiff's 19 U.S.C. § 1520(c) claim and denied plaintiffs request for reliquidation. Customs advised plaintiff that if it disagreed with Customs decision, plaintiff could file a summons in U.S. Court of International Trade within 180 days.

June 14, 1993—Plaintiff files a summon in the U.S. Court of International Trade.

Despite the confusion resulting from Customs initial treatment of plaintiffs July 1, 1987 claim as a protest and the advice that plaintiff could file a suit in this Court within 180 days, the actual fact situation appears to the Court to be as follows:

An otherwise valid protest was filed by plaintiff on July 1, 1987, but was ineffective as untimely. Plaintiffs July 1, 1987 protest as a 19 U.S.C. § 1520(c) claim is itself a 19 U.S.C. § 1520(c) claim, which

was denied by Customs on December 21, 1992. No protest to this denial was made.

While the Court grants the motion of Customs to dismiss plaintiffs action for not having filed a timely protest to Customs denial of plaintiffs July 1, 1987 claim under 19 U.S.C. § 1520(c),³ the Court notes with approbation the position of Customs that a 19 U.S.C. § 1520(c) claim was applicable and appropriate in the circumstances. Since plaintiff did not file a protest against Customs' December 21, 1992 decision, 28 U.S.C. § 1581(a) is inapplicable.

CONCLUSION

For the foregoing reasons, the Court holds that it does not possess jurisdiction to entertain plaintiffs 19 U.S.C. § 1520(c) claim. Customs' Motion to Dismiss is granted and this action is dismissed.

³ The denial of plaintiff's July 1, 1987 claim was made four and one-half years after the claim was filed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/96 10/4/94 Aquilino, J.	Benteler Industries, Inc.	89-01-00052	610.52 7.5% plus additional duties on the alloy con- tent of the steel pur- suant to Headnote 4, to Part 2, Schedule 6, TSUS	696.32 or equivalent based on date of entry 3.1%	Agreed statement of facts	Detroit, MI Tubular sections of BTR 110
C94/97 10/4/94 Goldberg, J.	Dressy Teasy, Inc. et al.	91-11-00837, etc.	Jackot 6202.93.50 29.5% Trousers 6204.63.35 30.4%	6211.43.00 17%	Agreed statement of facts	New York Women's track suits of man-made fibers
C94/98 10/7/94 DiCarlo, J.	Gates-Mills, Inc.	93-10-00712	6216.00.32 14%	6216.00.46 5.5%	Agreed statement of facts	New York "Hunting Gloves"

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
New York, NY

ANNOUNCEMENT

NINTH ANNUAL JUDICIAL CONFERENCE OF THE
U.S. COURT OF INTERNATIONAL TRADE

Chief Judge Dominick L. DiCarlo has announced the call of the Ninth Annual Judicial Conference of the U.S. Court of International Trade. The Conference is scheduled for Wednesday, November 16, 1994 at the Holiday Inn Crowne Plaza, 49th Street and Broadway, New York City, and will commence promptly at 9 a.m.

The theme of the Conference is: *"The U.S. Court of International Trade Adaption in a Time of Change."*

The Conference will be attended by the Judges of the U.S. Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 350 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past eight Judicial Conferences.

All interested persons are invited to attend. Further information and registration forms may be obtained by contacting Leo M. Gordon, Assistant Clerk, at 212-264-7090.

Dated: October 3, 1994.

JOSEPH E. LOMBARDI,
Clerk of the Court.



Index

Customs Bulletin and Decisions
Vol. 28, No. 43, October 26, 1994

U.S. Customs Service

Treasury Decision

	T.D. No.	Page
Bonded carriers authorized to transport cargo without obtaining cartman's license; final rule; parts 19, 112, 113, 118, 125, 146, and 178, CR amended	94-81	1

General Notices

	Page
Copyright, trademark, and trade name recordings, No. 10-1994, August 1994	50
Customs Automated Export System (AES); public meetings to be held in San Jose, California, Atlanta, Georgia, and St. Louis, Missouri	54
Glassware, imported; proposed change of practice of tariff classification; solicitation of comments	56
IRS interest rate used in calculating interest on overdue accounts and refunds on customs duties, for quarter beginning October 1, 1994	65
Tariff classification, ruling letters:	
Modification:	
Archery bow cases	20
Value of foreign processing under subheading 9802.00.60	23
Walkie-talkies	29
Proposed modification; solicitation of comments:	
Diphenyl sulfone	47
NAFTA eligibility of solution administration sets	32
Proposed partial revocation; solicitation of comments:	
"Dirty bag"	38
Revocation:	
Drawstring pouch enclosing a handheld mirror	17

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Casio, Inc. v. United States	94-158	92
Industria de Fundicao Tupy v. Brown	94-156	73
Mitsubishi Electronics America, Inc. v. United States	94-155	69
New Zealand Lamb Co., Inc. v. United States	94-159	101
Timken Co. v. United States	94-157	82

Abstracted Decisions

	Decision No.	Page
Classification	C94/96-C94/98	105

Notice

	Page
Ninth Annual Judicial Conference of U.S. Court of International Trade	106



